No. 10140

In the United States Circuit Court of Appeals

For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER DEADY, and THE FIRST NATIONAL BANK OF PORTLAND, a national banking association,

Appellants,

vs.

RICHARD HOWELL,

Appellee.

APPELLANTS' BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, *District Judge.*

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JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court in this case is based upon 28 U.S.C.A., Sec. 41 (1), this being a suit between citizens of different states in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00. The plaintiff is a citizen of Connecticut (Par. I of

the Amended Complaint, Page 3 of the Transcript of Record); and the defendants are citizens of Oregon (Par. II and III of the Amended Complaint, Tr. 2, 3). The matter in controversy is a two-thirds interest in Lot 1, Block 212, City of Portland, Oregon, and the income therefrom since July, 1935, (Par. VIII of the Amended Complaint, Tr. 11, 12) which exceeds the sum or value of $3,000.00 (Par. IV of the Amended Complaint, Tr. 3).

While the District Court as such had jurisdiction of the case, we believe there were absent from the case necessary parties for a decision of the matter in issue. This point, which will be discussed later in this brief, was embodied in the fifth and sixth defenses of the Answer (Tr. 68).

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

The jurisdiction of the Circuit Court of Appeals to review the decree of the District Court (Tr. 178) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

CONCISE STATEMENT OF THE CASE

This suit involves the construction of the Will of Lucy A. H. Deady, the widow of Judge Matthew P. Deady who was the first United States District Judge for the District of Oregon.

The defendants-appellants contend that under the Will Henderson Brooke Deady received only a defeasible fee interest in Lot 1, Block 212, City of Portland, Oregon, which was defeated by his death without leaving issue; and the plaintiff-respondent contends that Henderson (who was his stepfather and through whom he claims) received an absolute fee-simple interest in Lot 1, Block 212, which was not defeated by his death without issue.

Mrs. Deady died on August 29, 1923, at the age of 89 years, leaving as her assets a parcel of real property in downtown Portland, Oregon, known as Lot 1, Block 212, City of Portland, which was appraised in her estate at $275,000.00, and other assets appraised at $1,347.02.

She left a Will, dated July 29, 1920, three years before her death.

At the time of the execution of her Will and also at the time of her death she had one living child, Henderson Brooke Deady; two deceased children Paul R. Deady and Edward Deady; two grandchildren, Matthew Edward Deady and Hanover Deady, children of the deceased son, Edward Deady; and three daughters-in-law: Amalie B. Deady (wife of Henderson Deady), Marye T. Deady (widow of Paul Deady), and Mary E. Deady (widow of Edward Deady).

At the time of the execution of Mrs. Deady's Will her son Henderson was 51 years old; and her grandsons Matthew and Hanover were, respectively, 31 and 28 years old.

At his mother's death, at the time her Will was made, Henderson Deady was, and for many years prior thereto had been, separated and living apart from his wife Amalie B. Deady, and had never had any children.

At the time of the execution of Mrs. Deady's Will and at the time of her death Lot 1, Block 212 was leased at a substantial rental under a lease that had many years to run, and was encumbered by a $40,000.00 mortgage.

Mrs. Deady's Will

Mrs. Deady's Will is printed in full in the Transcript, pages 4-9, and in Appendix "A" to this brief, page 79. We set forth here three paragraphs of this will which we think are controlling but ask the court, at this point, to read the entire will.

> "IN THE NAME OF GOD, AMEN: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:
>
> * * * * * * * *
>
> "Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.
>
> * * * * * * * *
>
> "Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons here-

inbefore named, and I give and devise the same to my said grandsons.'

"Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady."

* * * * * * * *

The Will was admitted to probate in the Circuit Court for Multnomah County, Oregon, on the 5th of September, 1923, and Letters Testamentary were thereafter issued to Joseph Simon, her attorney, and Henderson Deady, named in the Will as executors. They administered the estate until Henderson's death, on May 28, 1933, after which Joseph Simon continued as the sole executor until his death on February 14, 1935, when The First National Bank of Portland (successor by merger to the Security Savings and Trust Company which was named in the Will as the alternative executor) was appointed executor. The Bank administered the estate until March 6, 1936, at which time the estate was closed, the Bank discharged as executor, and Lot 1, Block 212, turned over to the Bank (successor by merger to the Security Savings and Trust Company which was also named in the Will as alternative trustee) as trustee.

Henderson Deady and his wife Amalie B. Deady were divorced in 1925; and Henderson shortly there-

after married Charlotte Howell Deady who was his wife at the time of his death.

Henderson died on May 28, 1933, without leaving issue and without ever having had issue.

At his death Henderson left a will, made on October 22, 1932, in which he specifically exercised the power of appointment in respect to the income from Lot 1, Block 212, given him in paragraph Eighth of his mother's will, but made no other mention of the property. (see Tr. 22.)

Charlotte Howell Deady, Henderson's widow, died on July 12, 1935, having had no children by Henderson, and leaving a son by a former marriage, Richard Howell, the plaintiff in this case. She left a will (Tr. 24,201) which specifically mentions property in Connecticut but does not mention Lot 1, Block 212, and names Richard Howell as her residuary beneficiary.

CONTENTIONS OF RESPONDENT

The plaintiff, Richard Howell, by his Bill of Complaint seeks to establish himself as the fee-simple owner of an undivided two-thirds interest in Lot 1, Block 212, City of Portland. He claims that Henderson Deady received such an interest under the Will of Lucy A. H. Deady(in spite of the fact that Henderson died without issue), and that Henderson's interest passed to Charlotte under Henderson's will, and to the plaintiff under Charlotte's will. (If Henderson had such an interest in the of Henderson's and Charlotte's wills.)

The plaintiff, by his Complaint, further contends that the Fifth and Sixth items of the Will of Lucy A. H. Deady are invalid, and the restrictions therein placed upon Lot 1, Block 212, are void; and, further, that the Will did not place the property in trust.

Of course, unless the plaintiff establishes that he has an interest in the property he cannot complain respecting any restrictions placed upon the property by Mrs. Deady's Will.

CONTENTIONS OF APPELLANTS

The defendants are Matthew Deady and Hanover Deady (the grandsons of the Testatrix named in her Will), and The First National Bank of Portland (successor, by merger, of the Security Savings and Trust Company which is named in the Will as Executor and Trustee in succession to Henderson Deady and Joseph Simon). They contend that, under the Will of Lucy A. H. Deady, Henderson Deady received only a defeasible or determinable fee estate in Lot 1, Block 212, subject to be terminated by Henderson's death without leaving issue, and that, since Henderson did die without leaving issue, his interest in the property terminated and passed to Matthew and Hanover. They further contend that the restrictions placed upon the property under the Will are valid, and that Lot 1, Block 212, is left in trust by the Will.

As observed hereinbefore, *unless the plaintiff establishes an interest in the property, the validity*

of the restrictions and the presence of a trust are no concern of his, and therefore need not be passed upon in this case.

In addition to the defeasible interest in the real property itself the Will, of course, gives Henderson Deady the power, if he so elects, to bequeath by his own will to his wife, for the period of her life, the income which Henderson would have received from the property if he were living. There is no dispute about this, and Henderson by his will did exercise this power in favor of his wife who enjoyed the income from the two-thirds interest in the property from the time of Henderson's death until her death in 1935.

PROCEEDINGS IN THE DISTRICT COURT

To the Amended Bill of Complaint (Tr. 2-27) the defendants filed a Motion to Dismiss (Tr. 28-29) on the grounds that the Complaint did not state facts sufficient to constitute a cause of suit or action, and that it appeared upon the face thereof that the suit was not commenced within the time required by law. The Motion to Dismiss was denied (Tr. 33), on the basis of a written opinion (Tr. 34-63) filed by the Court.

Thereafter an Answer (Tr. 64-71) was filed setting up ten separate defenses:

The first defense is that the Complaint fails to show that the plaintiff has any interest in the property.

The second and third defenses are now abandoned.

The fourth defense contains appropriate admissions and denials in respect to the allegations of the Complaint.

The fifth defense raises the point that the estate of Henderson Deady, through whom the plaintiff claims, has not been closed and therefore his executor is a necessary party to this suit.

The sixth defense raises the point that the estate of Charlotte Howell Deady, through whom the plaintiff claims, has not been closed and therefore her executor is a necessary party to this suit.

The seventh defense asserts that by the language of her Will Mrs. Deady intended to give Henderson only a defeasible fee in Lot 1, Block 212, subject to be defeated in favor of Hanover and Matthew by Henderson's death under the circumstances under which it occurred.

The eighth defense pleads practical construction of the will by interested parties.

The ninth defense pleads an estoppel by reason of representations by Henderson, and reliance thereon by Matthew and Hanover.

The tenth defense pleads laches.

A Pretrial Order was made (Tr. 72-112).

The case came on for trial on January 21, 1941. The testimony and proceedings at the trial are found on pages 198 to 478 of the Transcript of Record. During the trial the Court received all the evidence offered, but in many instances reserved its decision

thereon for later ruling. On May 21, 1941, the Court filed a written opinion on the admission of evidence (Tr. 112-130). Thereafter on November 17, 1941, the Court filed its opinion (Tr. 131-152) deciding the case in favor of the plaintiff's contentions.

Findings of Fact and Conclusions of Law were entered (Tr. 152-177), and a Decree (Tr. 178-183) was made and entered on February 24, 1942, decreeing among other things, that the Will of Lucy A. H. Deady gave Henderson an undivided two-thirds interest in Lot 1, Block 212, in fee simple which was not defeated by his death without leaving issue; that the Seventh paragraph of the Will referred only to Henderson's death without issue during the lifetime of the Testatrix; that the plaintiff Richard Howell succeeded to Henderson's fee-simple interest through Henderson's Will and the Will of Charlotte Howell Deady; that the Will did not create a trust of the property; that the Fifth paragraph of the Will creating a sinking fund for the purpose of retiring the mortgage is void; and that the Sixth paragraph of the Will restricting the encumberance and disposition of the property is void.

Thereafter an Appeal from the Decree was duly taken (Tr. 183-185).

SPECIFICATIONS OF ERRORS

(1) The Court erred in denying the defendants' Motion to Dismiss the Amended Complaint, and in failing to dismiss said Amended Complaint.

(2) The Court erred in entering a decree in favor of the plaintiff, and in granting to the plaintiff any of the relief prayed for in the Amended Complaint.

(3) The Court erred in Findings of Fact No. X to XXIII, (Tr. 165-9) in finding: that it was not the intention of Lucy A. H. Deady by her Will to defeat, cut down, or limit the estate devised to Henderson Brooke Deady if he outlived her (X-XII); that upon the death of Henderson Brooke Deady a fee-simple estate passed by testamentary devise to his widow, Charlotte Howell Deady, and upon her death a fee-simple estate passed by testamentary devise to plaintiff (XIII); that plaintiff now has such undivided two-thirds interest, or any interest, in said property (XIV); that neither plaintiff nor his predecessors have ever agreed to any other or different construction of said will (XV); that neither Henderson Brooke Deady nor Charlotte Howell Deady nor plaintiff has at any time construed said will to mean that Henderson Brooke Deady received only a defeasible fee in said property, subject to be defeated by his death without issue (XVI); that Henderson Brooke Deady never represented to defendants Hanover Deady or Matthew Deady that Lucy A. H. Deady by her will intended to give Henderson Brooke Deady only a defeasible fee in said real property, which would be defeated in favor of Hanover Deady and Matthew Deady upon Henderson Brooke Deady's death without issue, or that he, the said Henderson Brooke

Deady, under said will received such a defeasible fee in said property, or that upon his death without issue his interest in the property would go to them subject only to the power of appointment in favor of his wife, given in said will, and that Hanover Deady and Matthew Deady did not act on any such representations to Henderson Brooke Deady's benefit, or to their detriment (XXII); that Henderson Brooke Deady did not at any time acquiesce in the interpretation of said will that he received only a defeasible fee in said property, and that he did not elect to accept said interest, and that he did not waive any other interest therein (XVIII); that the executors of the Estate of Henderson Brooke Deady did not accept or acquiesce in the interpretation that said will devised only a defeasible fee to Henderson Brooke Deady in said property (XIX); that plaintiff and his predecessors in interest have not been guilty of laches or undue delay in bringing this suit or making claim to be owners of an absolute fee-simple estate in said property (XX); that as early as October 26, 1923, Henderson Brooke Deady asserted that he was the owner of an absolute fee-simple estate in an undivided two-thirds interest in said property (XXI); that there had been no waiver by plaintiff or his predecessors in interest of any right to or interest in said property, and that plaintiff and his predecessors in interest made no election to accept any lesser interest than an undivided two-thirds interest in fee-simple (XXII); and that Lucy A. H. Deady did not by

her will intend to create or provide for the creation of a trust of the real property involved in this case (XXIII).

(4) The Court erred in the Conclusions of Law (Tr. 174-7) numbered 1, 2, 3, 4, 6, 7, and 8, the substance of which is the same as the Findings of Fact referred to in specification of error No. 3; and also erred in said Conclusions of Law in concluding that the plaintiff is the real party in interest and the only necessary party plaintiff to this suit (9), that neither plaintiff nor his predecessors in interest are estopped from asserting that they are owners of said property (10), that defendant The First National Bank is not vested with any rights as Trustee (11), and that defendants are bound to make accounting to plaintiff of the rent, income, and profits (12), and that decree should be entered in accordance with said Findings of Fact and Conclusions of Law (13).

(5) The Court erred in entering paragraphs I to X, inclusive, of the final decree (Tr. 178-83), the substance of which is identical with the Findings of Fact described in Specification No. 3, and in entering a decree that defendants make accounting.

(6) The Court erred in rejecting from evidence all oral expressions of Lucy A. H. Deady (Tr. 117, 264-70, 385-7, 390-4, 399-401, 406-7, 411-15), the objection having been that the evidence was irrelevant and immaterial, and incompetent to prove any issue in this case, and incompetent to prove the intent of the testatrix (Tr. 264); erred in excluding de-

fendants' pre-trial Exhibit A (certified copy of petition for probate of the Will of Henderson Brooke Deady, (Tr. 122, 205-7), and also in rejecting defendants' pre-trial Exhibit B (Inventory and Appraisement of the Estate of Henderson Brooke Deady, Deceased (Tr. 122, 212-3), the objections to each of said exhibits having been that it is entirely irrelevant and immaterial to any issue, that nothing stated therein could bind plaintiff, that it could not be construed as any act or admission of Henderson Brooke Deady (Tr. 205-6); erred in rejecting the testimony of Samuel B. Weinstein concerning conversations with Chester Dolph (Tr. 123, 224-5), the objection having been on the ground that said conversations were wholly incompetent to prove any issue and were not with any persons claiming any rights under the will of Mrs. Deady (Tr. 221). The court also erred in excluding (Tr. 129) defendants' pre-trial exhibits F (Order Determining State Inheritance Tax, Tr. 425), L (Stipulation for Settlement of Inheritance Tax, Tr. 429), M (Petition for Determination of Inheritance Tax, Tr. 433), N (Order Fixing Inheritance Tax, Tr. 436), O (Letter Regarding Inheritance Tax, Tr. 438), P (Letter to Robert F. Maguire, Tr. 441), Q (Letter from Wilbur, Beckett & Howell to Joseph Simon, Tr. 445) and R (carbon copy of letter from Joseph Simon to Wilbur, Beckett & Howell, Tr. 451). All said exhibits were rejected on the ground the same were irrelevant and immaterial (Tr. 425-451).

ARGUMENT

Both the law and the facts in this case are, we believe, quite simple and become complex only when things are read into Mrs. Deady's Will which are not there.

The basic issue in this case, and the one which determines the decision herein, is whether the Seventh item of Mrs. Deady's Will, which is as follows: "That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named and I give and devise the same to my said grandsons", refers only to Henderson's death without issue *prior* to the Testatrix's own death, or whether it refers to Henderson's death without issue at any time.

It is agreed that Henderson died subsequent to the death of the Testatrix without issue and without ever having had issue.

The natural and ordinary meaning of the language of the Seventh item is death without issue *at any time.* As Mr. Justice Gray said in *Britton vs. Thornton*, 112 U. S. 526, 332-333 (quoted with approval by the Oregon Supreme Court in Bilyeu vs. Crouch, 96 Or. 66, at p. 71; 89 P. 222, at p. 224; and again in Imbrie vs. Hartrampf, 100 Or. 589, at p. 602; 198 P. 521, at p. 525; and cited with approval in Shadden vs. Hembree, 17 Or. 14, at p. 25-26; 18 P. 572, at p. 577): "When indeed a devise is made to one person in fee, and in case of his death to an-

other in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. * * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator."

Not only are there no other provisions in the Will requiring the language of the Seventh item of Mrs. Deady's Will to be interpreted in any other than its natural import, but the remaining portions of the Will emphasize that Mrs. Deady intended the gift over to her two grandsons to take effect upon Henderson's death after her own without issue. And even if death at any time without issue was not the natural and ordinary meaning of the words of the Seventh item (which, of course, we do not concede), the ascertainment of the Testatrix's expressed intention from the entire Will, which is the cardinal principal accepted by all courts in the construction of wills, and to which all other rules of construction must yield, shows that she could have had no other intention in the Seventh item.

As a part of the Bill of Complaint not only do we have Mrs. Deady's Will which, we believe, shows

clearly what the Testatrix's intentions were, but we also have as a part of the Complaint (Tr. 22) the will of Henderson Deady, executed more than twelve years after his mother's death, during which period he had been one of the executors of her Will. In his will (Tr. 22) Henderson clearly recognizes that he did not receive an absolute fee-simple interest in Lot 1, Block 212, and that the only thing he had to leave under his will in respect to the property was an appointment of the income to his widow for the period of her lifetime, as specifically provided in the Eighth item of his mother's Will. This interpretation by Henderson, through whom the plaintiff claims, should be of assistance to the Court.

The Motion to Dismiss should have been sustained because it appears upon the face of the Complaint that the plaintiff has no interest in Lot 1, Block 212.

Our conclusions as to the proper construction of Mrs. Deady's Will, from the Will itself, are further corroborated by evidence, oral and written, produced at the trial, which we believe to be admissible and helpful to the Court.

Before proceeding to an analysis of the Will itself certain legal principals should be mentioned:

I.

In construing a will, the cardinal principle, accepted by all courts, is to ascertain the expressed intent of the testator from the entire instrument, and to give effect to that intention unless the same be illegal. To that principle all technical rules of construction must yield.

O.C.L.A., Sec. 18-402.
Smith vs. Bell, 6 Peters 68
Bilyeu vs. Crouch, 96 Or. 66, 69; 189 P. 222, 223
Gildersleeve vs. Lee, 100 Or. 578, 584; 198 P. 246, 248
Imbrie vs. Hartrampf, 100 Or. 589, 594; 198 P. 521, 523
Stubbs vs. Abel, 114 Or. 610, 619; 233 P. 852, 855
In Re Briggs' Estate, 186 Cal. 351; 199 P. 322
In Re Kirkpatricks' Estate, 280 Pa. 306; 124, A. 474.
Closset vs. Burtchaell, 112 Or. 585, 601; 230 P. 554, 559
Beakey vs. Knutson, 90 Or. 574; 174 P. 1149

In *Beakey vs. Knutson, supra,* the Oregon Supreme Court said:

> "The dispute is to be solved by a proper construction of the will in question. It is elementary that the whole instrument must be taken together and construed so as to effect the intention of the man who executed the writing, owned the property and had the power to dispose of it. We cannot adopt a process of dialysis, taking here a part and there a part of the document, and base our conclusions on any single clause."

In *Bilyeu vs. Crouch, supra,* the Supreme Court of Oregon, in considering the meaning of the phrase

"die without issue", said:

> "The parties are agreed, and it is not necessary to cite precedents in support of the proposition, that the controlling factor in the calculation is the intent of the testatrix, to be derived from a careful examination of her testamentary declaration. This is codified in Section 7347, L.O.L."

II.

Though it is a well-settled rule that, where property is devised in one clause of a will in language which would clearly pass an absolute fee simple estate, the estate devised cannot be diminished by a subsequent paragraph in the will unless the subsequent language shows a clear intention so to do (see O.C.L.A., Sec. 18-603); it is equally well settled that language in one clause of a will which, standing alone, would pass an absolute fee simple estate, may be validly limited by a subsequent provision in the will showing an intention to pass only a defeasible or limited fee.

Imbrie vs. Hartrampf, *supra*, 100 Or. 589, 598, 601; 198 P. 521, 524, 525.
Stubbs vs. Abel, *supra*, 114 Or. 610, 631-632; 233 P. 852, 859.
Britton vs. Thornton, *supra*, 112 U.S. 526, 532.
Reed vs. Williams, 194 Ky. 662; 240 S.W. 391.
Vanderzee vs. Slingerland and Haswell, 103 N.Y. 47; 8 N.E. 247.
Rowland vs. Warren, 10 Or. 129, 131.
In Re Barrett's Estate, 85 Neb. 337; 123 N.W. 299.

A. This rule in respect to "cutting down the fee" is not a rule of property, but one of construction.

Reed vs. Williams, supra.

B. A qualified, defeasible, or determinable fee is an estate in fee which ends or is defeated upon the happening of a specified event.

Stubbs vs. Abel, supra.
In Re Barrett's Estate, supra.

III.

Where a defeasible fee is given by the whole will, it is not a case of "cutting down a fee", or of giving effect to contradictory or inconsistent provisions, but the subsequent clause merely expresses one part of the testator's testamentary intention. Neither clause is complete within itself, but together they create the conditional or defeasible fee.

In Re Briggs' Estate, *supra,* 186 Cal. 351; 199 P. 322, 324.
In Re Barrett's Estate, *supra,* 85 Neb. 337; 123 N.W. 299, 301-302.
Rowland vs. Warren, *supra,* 10 Or. 129, 131.

For quotations from these three cases see Appendix "B", this Brief, page 83.

IV.

Where a devise of property in one clause of a will is specifically and expressly made subject to subsequent limitations, and in subsequent paragraphs of the will the estate given is made subject to defeasance, the devisee, by the first paragraph, received from the outset only a defeasible or limited fee, and the rule in respect to "cutting down the fee" has no application.

Stubbs vs. Abel, *supra,* 114 Or. 610; 233 P. 852.
Vanderzee vs. Slingerland, *supra,* 103 N.Y. 47; 8 N.E. 247.

For quotations from the *Stubbs* case, *supra,* see Appendix "C", page 85.

V.

While the construction that has geen given a will by an interested party may not be controlling, it is persuasive on the courts, especially where the interested party is one through whom the litigant demanding the opposite construction is claiming.

Stubbs vs. Abel, *supra,* 114 Or. 610, 624; 233 Pac. 852, 857.
Moore vs. Moore, 121 Or. 48, 56; 252 Pac. 964, 967.
NOTE in 94 A.L.R., beginning at page 245.
NOTE in 67 A.L.R. 1272.
Wiggins vs. Hill, 145 Ark. 152; 223 S.W. 394, 395.
Re Estate of Kelly, 177 Minn. 311; 225 N.W. 156; 67 A.L.R. 1268.

VI.

A power of appointment created by a will lapses if the donee of the power dies before the maker of the will; consequently, if a testator by his will creates a power of appointment in X and X predeceases the testator, any attempt by X to exercise the power of appointment in his will is ineffective.

In Re Fowle's Will, 222 N.Y. 222; 118 N.E. 611.
In Re McCurdy's Estate, 197 Cal. 276; 240 P. 498.
Curley vs. Lynch, 206 Mass. 299; 92 N.E. 429.
49 C. J. 1257, Sec. 26.

It is said in *49 C. J., supra,* at page 1257:

"Where the donee of a power given by the will of another dies before the testator, the power is a nullity, and an attempted exercise of it by the donee is void."

VII.

A will speaks only from the date of the death of the testator unless a contrary intention is manifested by the language of the will.

Kaser v. Kaser, 68 Or. 153; 137 P. 187.
Bacon v. Dickinson, 199 Ky. 121; 250 S.W. 807.
Pape v. U. S. Natl. Bank, 135 Or. 650; 297 P. 845.

The Oregon Court, in the *Kaser* case, *supra,* which involved the question of whether the death of a beneficiary referred to in a will meant death before or after that of the testator, said:

"Though a will, for some purposes, may be construed as speaking from the date of execution, as a general rule its expressions are supposed to give utterance to the testator's intention at the time of his death, unless by a fair construction the language manifests a purpose to speak as of a different date. * * * The will under consideration was executed December 14, 1905, or nearly 5½ years before the testator died."

VIII.

A. No particular language is necessary to the creation of a trust, and whether one exists is to be ascertained from the intention of the creator.

Allen vs. Hendrick, 104 Or. 202, 227; 216 P. 733.
Beakey vs. Knutson, *supra,* 90 Or. 574; 174 P. 1149.
Colton vs. Colton, 127 U.S. 300, 310.

1 Scott on Trusts, Sec. 24.
1 Bogert on Trusts and Trustees, Sec. 45.

B. Even though under a will the legal estate is not in terms devised to the trustee, the rule is that the trustee takes that quantity of estate which the purposes of the trust require.

Beal vs. Higgins, 135 N.E. 759, 760; 303 Ill. 370.
Windsor vs. Barnett, 207 N.W. 362, 364; 201 Ia. 1226.
Sherwin vs. Smith, 282 Mass. 306; 185 N.E. 17.
Blake-Curtis vs. Blake, 149 Kans. 512; 89 P. (2d) 15.

IX.

A federal court, in construing a will devising real property, will follow the rules of construction laid down by the courts of the state wherein the real property is situated; but where there is no state rule the federal court will apply its own rules of construction.

Barber vs. Pittsburgh, 17 S. Ct. 488; 166 U.S. 83.
Erie R. Co. vs. Tompkins, 58 S. Ct. 817; 304 U.S. 64.

X.

The phrase "die without issue", used by a testator in a will in which he devises property to a beneficiary in one clause and subsequently provides that if the beneficiary "die without issue" the property devised shall go over to other named persons, means death of the beneficiary at any time under the circumstances named, and is not confined to the death of the beneficiary prior to that of the testator.

A. There is an irreconcilable conflict in the authorities as to the meaning of the phrase "die without issue", which conflict the Oregon decisions recognize when they accept the doctrine that the phrase means death of the beneficiary at any time either before or after that of the testator.

In the case of *Bilyeu vs. Crouch*, *supra*, (96 Or. 66; 189 P. 222), the Oregon Supreme Court refers to the fact that "the authorities are multitudinous on both sides of this question", and states, "we will not attempt to distinguish or reconcile them". But the court then goes on to say that in Oregon *"the question has been foreclosed by the early decision of Rowland vs. Warren,* 10 Or. 129", which the court then analyzes and interprets as holding that the phrase means death of the beneficiary at any time either before or after that of the testator. (Italics added.)

B. In addition to the several Oregon cases on the point (which will be analyzed and discussed hereinafter in detail) the following are representative of the authorities generally which hold that when a testator provides a gift over if the first taker "die without issue" death of the beneficiary under those circumstances at any time, whether before or after the death of the testator, is presumed to have been intended.

Britton vs. Thornton, *supra*, 112 U.S. 526. U.S. 526.

Briggs vs. Hopkins, 103 Ohio 321; 132 N.E. 843.

Bacon vs. Dickinson, *supra*, 199 Ky. 121; 250 S.W. 807.

In re Brigg's Estate, *supra,* 186 Cal. 351; 199 P. 322.

St. Paul's Sanitarium vs. Freeman, 102 Texas 376; 117 S.W. 425.

Hampton vs. Newkirk, 115 A. 656 (N.J.).

Ahlfield vs. Curtis, 229 Ill. 139; 82 N.E. 276.

Restatement: Property, Sec. 267, p. 1347.

2 Alexander on Wills, Sec. 950, 1026-7.

2 Jarman, Wills (6th Ed.) 719: "The general rule is that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator."

O'Mahoney vs. Burdette, L. R. 7 H. L. 388: This case established the law of England on the point, and its holding on this point has been cited with approval by the United States Supreme Court (*Britton vs. Thornton, supra,* and other cases), and by the courts of many states.

C. Even in those jurisdictions where the words "die without issue", standing alone, are presumed to mean death prior to that of the testator, this is only a rule of construction and the courts will lay hold of "the slightest indications" in the will to overcome the presumption and to give effect to the language according to its natural import, namely, death at any time, either before or after that of the testator.

In re Carother's Estate, 161 Cal. 588; 119 P. 926.

In re Barrett's Estate, *supra,* 85 Neb. 337; 123 N.W. 299.

Vanderzee vs. Slingerland, *supra,* 103 N.Y. 47; 8 N.E. 247.

Chapman vs. Moulton, 40 N.Y. Supp. 408; 8 App. Div. 64.

In re Mebus' Estate, 273 Pa. 505; 117 A. 340.
In re Clifton's Estate, 205 Ia. 913; 218 N.W. 926.
In the Matter of Cramer, 70 N.Y. 271.
In re Kirkpatrick's Estate, *supra,* 280 Pa. 306; 124 A. 474.
In re Haydon's Estate, 334 Pa. 403; 6 A. (2d) 581.

For quotations from some of these cases see Appendix "D", page 87.

D. The following are all the Oregon cases which deal with the phrase "die without issue", or words of similar import, when used in wills:

Rowland vs. Warren, *supra,* 10 Or. 129.
Buchanan vs. Schulderman, 11 Or. 150; 1 P. 899.
Shadden vs. Hembree, *supra,* 17 Or. 14; 18 P. 572.
Love vs. Walker, 59 Or. 95; 115 P. 296.
Kaser vs. Kaser, 68 Or. 153; 137 P. 187.
Bilyeu vs. Crouch, *supra,* 96 Or. 66; 189 P. 222.
Imbrie vs. Hartrampf, *supra,* 100 Or. 589; 198 P. 521.

We shall now review these Oregon cases.

Rowland vs. Warren, supra (10 Or. 129).

In this case the testator devised certain real property to his daughter, Mary E. Hembree, "to her and her body heirs forever", and by a later clause in the will provided: "I further will that if my daughters, Martha Ann and Mary E. Hembree, die without children the land shall revert back to my other heirs". Mary survived the testator, and died leaving children. During Mary's lifetime an execution on a judgment against her was levied and the

land was sold. The court held (p. 132):

> "It follows that Mary E. Hembree took either a fee simple or a fee simple conditional, defeasible on the contingency of her dying without leaving children, with a limitation over by executory devise. As such contingency did not happen, she held the whole estate, and the sale of the estate, under the judgment against her, conveyed a good fee simple title to the purchaser. The fact that the sale was made before the period had arrived at which the contingency was to happen or fail, does not affect the title. The purchaser took the estate subject to be defeated by the happening of the contingency."

The Oregon Supreme Court, in a much later case (Bilyeu vs. Crouch, supra, which will be discussed in detail presently), considering again the question of whether the phrase "die without issue" referred to death in the lifetime of the testator or death at any time, said that "in this state the question has been foreclosed by the early decision of Rowland vs. Warren, 10 Or. 129", and went on to point out that the inference to be drawn from the opinion in the Rowland case was that if Mary had died without children the estate devised to her would have been defeated—in other words, that though she survived the testator she still took only a defeasible fee, subject to be defeated by her own death without children at any time.

Buchanan vs. Schulderman, supra (11 Or. 150; 1 P. 899).

The will of the testator gave property to his two daughters "for the term of their natural lives, and

after their death, or the death of either of them, the shares of the one dying, to her children in fee-simple, the children of each daughter to take one-half thereof, or in case of the death of either of said daughters, without issue, then the children of the other daughter to take all of the same * * *." The court held that when the testator in his will provided that if either of the daughters should die without issue the property should go to the children of the other, "this language, uncontrolled, * * * must be construed to import a definite failure of issue—that is, dying without lineal descendants surviving after the death of the tenant for life."

Shadden vs. Hembree, supra (17 Or. 14; 18 P. 572).

The testator, in the second clause of his will, devised his farm to his son; in the third clause he devised his town property to his wife; in the fourth clause he provided that his wife should have the control and management of all of his property during her life, and it should then go to his son "except as herein provided"; and in the sixth clause testator provided, "It is my will that in the event that my beloved wife and son, Henry M. Hembree, shall die before my son shall become twenty-one years of age, that it is my will that my real estate shall descend to my nephew, Frank M. Shadden, and in the event mentioned, I do so will and bequeath the same to him * * *". The testator died in 1876, his widow in 1880, and his son in 1884. The court refers to the Oregon statute providing that the courts in

construing wills shall give due regard to the intention of the testator, and refers to the statement by Chancellor Kent that the intention of the testator is to be gathered from the whole will. The court goes on to say that the sixth clause of the will must be read in connection with the second and fourth clauses, and that, taking them together, the testator meant that his wife should have the use of all of his property during her widowhood and it should then go to his son, but that in the event of the death of both his wife and son before the son reached the age of 21 years of age, the property should go to the nephew, Frank Shadden. The court then considers the rule that a gift over simply in the case of "the death" of the first taker, without any other condition, refers to death in the lifetime of the testator, in the absence of a contrary intention indicated in other parts of the will; and then the court cites the rule laid down by the Supreme Court of the United States in *Britton vs. Thornton* (hereinbefore discussed), which adds to the above-mentioned rule the further rule that if the death of the first taker is coupled with other circumstances, such as death without issue, death at any time is meant, in the absence of expressions in the will to the contrary, and the Oregon court then decides that in the sixth paragraph of the will the testator did not mean death of the son only in the lifetime of the testator.

Love vs. Walker, supra (59 Or. 95, 115 Pac. 296)

The testator directed that his estate be divided

into six equal shares, and gave one share to each of his six named children and grandchildren, one being his son, Green C. Love. In a codicil to the will the testator provided:

> "I hereby will, decree and declare that the devise or legacy in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death without lawful issue born alive and living at the time of his death, then the said devise or legacy to him shall belong and go to the remaining devisees of my said will in proportion as they hold of the shares or parts of my said will."

In a suit by Green C. Love against the other devisees plaintiff contended that he, having survived the testator, received by the will an absolute fee simple interest in the property, because the condition of his dying "without lawful issue" meant his death prior to that of the testator, and not his death at any time. The defendants, on the other hand, contended that the phrase meant his death at any time. The court quotes (59 Or. at p. 102; 115 Pac. at p. 299) from *Jarman on Wills,* 6th Ed., p. 719, to the effect that where the context is silent the words refer to the death of the first taker at any time, either before or after that of the testator. It also quotes from *Rood, Wills,* Section 653, that the intention that the words refer to death after the death of the testator may be inferred from other provisions in the will.

The court mentions and quotes from conflicting

authorities with regard to the meaning of the phrase, but makes no attempt to reconcile the conflicting decisions, basing its decision "on what is believed to be the purpose of Lewis Love respecting the objects and the extent of his bounty." The court held that the testator, by the phrase "death without lawful issue", referred to the first taker's death *at any time,* whether before or after the testator's own death.

In commenting upon this decision, the Supreme Court of Oregon, in the later case of *Bilyeu vs. Crouch, supra* (which will be discussed in detail presently), cites the case as definitely holding against the presumption of substitutionary intent, and states that Green C. Love's estate should have been described as a "defeasible fee" which was defeated by events occurring after the testator's death. Judge Burnett dissented in the Love case, but his dissent is authority equally as strong as the prevailing opinion against the substitutionary intent presumption. While he held, in the dissenting opinion, that Green C. Love had an absolute fee at the time of the suit, that holding was based upon Judge Burnett's contention that although Green C. Love had by the will and codicil taken only a defeasible fee, the condition of defeasance was his death without issue prior to January 1, 1907 (the testator having provided that trustees should hold the property until that date, when it should be distributed to the devisees), and he was alive on that date.

Kaser vs. Kaser, supra (68 Or. 153; 137 P. 187).

The first and second paragraphs of the will left all of the testator's property to the testator's widow for life, and provided that on her death it should be divided among the testator's seven children. The third paragraph provided that "in the event that any of my children * * * die leaving lawful issue, it is my will that said issue take the share thereby left to their parent; providing, however, that if any of my children should marry and die leaving husband or wife surviving but no issue, it is my will that such surviving husband or wife of my child or children, as the case may be, take nothing by this will." One of the children of the testator died after the testator's death, but during the lifetime of the testator's widow, leaving a widow of his own but no issue.

This was a suit by the son's administratrix and widow against his mother to establish an interest in the personal property in his father's estate. The son's widow contended that inasmuch as he survived his father he became the absolute owner of one-seventh of the real property (subject to his mother's life estate) even though he subsequently died without lawful issue, and therefore she, as the son's administratrix and wife, succeeded to his interest in the property upon his death. The court held, however, that when the testator referred to the death of any of his children without issue he had reference to their death at any time and not merely death prior to his own.

The decision is clearly against a presumption of substitutional intent.

Bilyeu vs. Crouch, supra (96 Or. 66; 189 P. 122)

Here the first clause of the will gave the testatrix's husband the sole use of her half of a donation land claim during his natural life, and in the third paragraph provided: "I give and bequeath unto my two sons, Frank Ingram and John L. Ingram, and their heirs male of their body, my donation land claim aforsaid, subject to the life estate of my husband * * *. But in case the said Frank and John L. Ingram or either of them should die without issue, then said lands bequeathed to them shall be equally divided between my daughters, Anna Ingram and Mary Jane Ingram * *."

The testatrix died in 1888; her husband in 1889; her son Frank in 1905. Plaintiff, in a suit to quiet title, claimed through deeds from Frank, who died without issue after the testatrix. The defendant claimed through Anna.

The court held for the defendant, on the ground that Frank had received only a defeasible fee which was defeated by his death without issue *after* the death of the testatrix.

The Oregon Supreme Court observed that the Oregon law was settled against substitutional intent, and cited with approval not only the Oregon cases of Rowland vs. Warren, supra, and Love vs. Walker, supra, as holding to that effect, but also the United States Supreme Court case of Britton vs. Thornton, supra.

The court stated the issue before it as follows: "Substantially, the contention of the plaintiffs is that the condition in the will to the effect that, if Frank Ingram should die without issue, then the land bequeathed to him should be equally divided between the daughters of the testatrix, Anna and Mary Jane Ingram, and their heirs forever, refers to the death of Frank Ingram occurring prior to the death of the testatrix. The defendant maintains that the language refers to the demise of Ingram at any time, whether before or after that of his mother, who made the will."

The Court made reference to and considered both the Oregon statute (Section 18-603, O.C.L.A.) from which the "cutting down of the fee" rule has been derived, and the Oregon statute (Section 18-402, O.C.L.A.) in reference to the intention of the testator governing the courts in the interpretation of a will.

Imbrie vs. Hartrampf, supra, (100 Or. 589; 198 P. 521)

By the third paragraph of his will, Robert Imbrie devised certain property to his son, James Imbrie. By the fourth paragraph he bequeathed certain sums of money to two of his daughters. By the fifth paragraph he gave certain sums of money to two other daughters. By the sixth paragraph he devised certain property to James Imbrie.

The seventh paragraph of the will was as follows: "I give, bequeath and devise to my son Ralph Imbrie, all the land that I own in * * * the Donation

Land Claim of Caleb Wilkins * * *, subject to the following restrictions, to-wit: Said land shall not in whole or part be sold or mortgaged until the said Ralph Imbrie is forty years of age, nor subject to his debts and should he sell or mortgage it, or any part of it, before that time, all his interest in said land shall cease and terminate, and said land shall descend to his children, if he then have any, and if not, then to all his brothers then living. *This devise to be accepted and received by him in full of any indebtedness to him,* except five hundred dollars. The encumbrance upon his land to be paid out of my estate." (Italics added).

By the eighth paragraph of the will, the testator devised a tract of land to James Imbrie. By the ninth paragraph he devised a tract of land to his son, T. R. Imbrie. By the tenth paragraph he devised all the rest, residue, and remainder of his property to all of his children, or to the children of any deceased child.

The twelfth paragraph of the will was as follows: "I further bequeath, devise and direct that should any of the above named devisees die without leaving lineal descendants, children or grandchildren, then in that case, all of the property above devised to such devisee shall go in equal shares to his or her brothers and sisters then living, or to the children of any brother or sister then deceased, by right of representation."

The purpose of this suit was to enforce specific performance of a contract under which Ralph Im-

brie agreed to sell and the defendant agreed to buy a part of the property devised to Ralph in the *seventh paragraph* of his father's will. The defendant had refused to complete the purchase upon the ground that Ralph did not, under the will, receive, and therefore could not convey, an absolute fee simple title.

Ralph had passed the age of 40 years and had not, prior thereto, violated the restrictions imposed by the seventh paragraph of the will by selling or mortgaging the real property therin described or permitting the same to become subject to his debts.

The court held that under the will Ralph received a fee simple interest in the property devised to him in the seventh paragraph and that the provisions in the twelfth paragraph providing for a gift over in the event of his death under certain circumstances, were not intended by the testator to apply to the property devised to Ralph in the seventh paragraph.

The court began its opinion by pointing out:

> "It is a cardinal principle of law that in construing a will the intention of the testator is the guide."

The court observed that this principle had been written into the statutory law of Oregon in what is now Section 18-402, O.C.L.A., and also referred to the well-established rule that an absolute fee given in one clause of a will in clear and explicit terms cannot be cut down by subsequent vague and doubtful language.

The court reached the conclusion that the testator did not mean by the provisions in the twelfth paragraph to cut down the fee devised to Ralph in the seventh paragraph, because the devise to Ralph in the seventh paragraph was based upon consideration, and the testator expressly stated therein that it was conditioned upon Ralph's accepting and receiving the devise in satisfaction of the testator's indebtedness to him. In other words, the court found affirmative indications in the will that when the testator provided in the twelfth paragraph for a gift over in connection with certain devises he was not referring to the devise made to Ralph in the seventh paragraph. It would seem to be apparent that in providing in the twelfth paragraph for a gift over the testator was referring only to the devises of the residue of his estate made in the tenth clause of the will.

The court quotes and applies the rule laid down by the Supreme Court of the United States in *Britton vs. Thornton, supra,* (112 U.S. 526) to the effect that a devise to one person in fee with a gift over in the event of the first taker's death without issue presumably refers to the death of the first taker *at any time,* whether before or after the death of the testator, unless there are other provisions in the will indicating a contrary intention.

The court reached the meat of its decision in the following words:

> "Whatever road we travel, and view as many precedents as we may, we necessarily come back

to the language found in the testamentary instrument."

This opinion of the Oregon Supreme Court in the *Imbrie* case confirms the rule, adopted at the outset in Oregon, that ,when a will provides for a gift over to named persons on the death of the first taker without issue, the gift over takes effect upon the first taker's death at any time without issue, either before or after the death of the testator, unless controlled by other provisions of the will; and there is no presumption that the gift over is intended to take effect only upon the first taker's death prior to that of the testator.

ANALYSIS OF THE DEADY WILL

We come now to an analysis of the Deady Will (Tr. 4-9) and an application of the pertinent principles of law.

In the FIRST item of the Will the Testatrix directs the payment of her debts and funeral expenses. In the SECOND she gives directions respecting her place of burial.

The THIRD item (Tr. 4) is as follows:

> "Third: *Subject to the conditions, provisions and charges thereon hereinafter made,* I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon." (Italics added.)

It is clear that by this Third item the Testatrix gives Henderson *not* an absolute fee, but a fee sub-

ject to such conditions, provisions, and charges as she might thereafter place upon it. *At the very outset* of this Third item Mrs. Deady gives notice in the plainest language that Henderson's interest in the property there devised to him was subject to the conditions, provisions and charges thereafter in the will to be specified. And thereafter she did make such spfecifications, including a provision in the Seventh item setting out the condition upon which Henderson's interest would be defeated.

In the above respect this case is like *Stubbs vs. Abel, supra* (114 Or. 610, 233 Pac. 852), where the testator devised certain property to three devisees "subject, however, to such disposition as I may hereinafter make of any portion thereof", and *Vanderzee vs. Slingerland, supra* (103 N. Y. 47, 8 N. E. 247), where a devise was made "subject to the proviso hereinafter contained", and *Chapman vs. Moulton, supra* (40 N. Y. S. 408, 8 App. Div. 64), also involving a "subject to" provision in a will. New York has a statute like Oregon's (Section 18-603, O. C. L. A.) from which the rule against "the cutting down of the fee" is derived. In all three of these cases the courts held that the "subject to" provision gave notice that in some subsequent portion of the will there was a condition or qualification attached to the fee. See particularly the language of the *Stubbs* case in 114 Or. at page 633, 233 Pac. at page 859, and of the *Vanderzee* case in 8 N. E., at page 250. The point made in the above three cases (that the "subject to" provision indicated from the outset that the

testator intended to devise only an interest subject to defeasance) finds no contradiction, so far as we are aware, in any of the authorities.

In the FOURTH item (Tr. 5) of Mrs. Deady's Will she devised to Matthew and Hanover the remaining one-third of Lot 1, Block 212, "subject to like conditions, provisions and charges thereon".

So, at this point in her will, the Testatrix has devised to Henderson a two-thirds interest in Lot 1 subject to such limitations as she thereafter in the will placed upon that devise; and has devised to Matthew and Hanover a one-third interest in Lot 1, subject to such limitations as she thereafter in the will placed upon that devise.

In the FIFTH item (Tr. 5) the Testatrix begins to enumerate "the conditions, provisions and charges" which she has theretofore referred to. She therein directs that out of the income from Lot 1 the sum of $150.00 per month be paid to one daughter-in-law for life, and that the sum of $75.00 per month be paid to another daughter-in-law so long as she remain unmarried; that out of "the remainder of the income" derived from the property $100.00 per month be paid to each of her grandsons, Matthew and Hanover; and that the rest of the income be paid to Henderson. The Testatrix then specifies that such division of the income derived from the property should continue during the lifetime of Henderson; but that before any of said income from the real property should be distributed to the beneficiaries all intheritance taxes against the estate

be paid therefrom, and that not less then $1,000.09 and not more than $2,500.00 per year ("in discretion of my Executors") be set aside for the purpose of retiring and paying off the mortgage debt then against the property.

By the SIXTH item (Tr. 6) of the Will the Testatrix directs that the property should not be sold, partitioned, or encumbered for a period of twenty-five years after her death, except for purposes of the improvement of the property or the renewal of the existing mortgage.

The contention has been made that this restriction against disposal or incumbrance of the property is void. While it is the law of Oregon that an absolute restraint on the alienation of property devised in fee simple absolute is void, there is a considerable question as to the application of that principle to the Sixth item of the Deady Will. Assuming, however, that the restrictions are void, the only effect is to free the property of those restrictions, and it can have no bearing whatever on the question of whether upon Henderson Deady's death without issue the gift over to Matthew and Hanover took effect.

We now come to the SEVENTH item of the will, which presents the vital issue in this case. It reads as follows:

> "Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons here-

> inbefore named, and I give and devise the same to my said grandsons."

The natural and reasonable meaning of this language can be only one thing—that if at the time of Henderson's death he had no children, grandchildren, or other descendants, the undivided two-thirds of Lot 1, which had been devised to him in the Third item of the will "subject to the conditions, provisions and charges thereon hereinafter made", should thereupon vest in Matthew and Hanover.

Before proceeding to a further consideration of this Seventh item we shall examine the remainder of the will, and return to a discussion of this Seventh item when we consider the will "in its entirety and from its four corners".

By the EIGHTH item the Testatrix "authorizes and permits" Henderson to bequeath by will to his wife, if he leaves one, the income which he would have received from the property had he been living. This is an ordinary power of appointment, indicatting very clearly that the Testatrix had not intended theretofore in the will to give Henderson an absolute undefeasible fee in the property. Otherwise it would have been entirely unnecessary for her to give him the added power of appointment, since an absolute fee, if he had one, would certainly have carried with it the right of disposition by will, without any added permission from the testator.

The presence of this power of appointment demonstrates beyond a question or doubt, we belive, that in the Seventh item Mrs. Deady was refer-

ring to Henderson's death *after* her own, and was not simply providing for a substitution of Matthew and Hanover for Henderson if he predeceased her. The power of appointment would not come into existence until Lucy A. H. Deady died and her Will took effect. If Henderson had predeceased her the attempted exercise of the power by Henderson in his will would have been entirely ineffectual.

As stated in 49 *C. J., at page* 1257, supra:

> "Where the donee of a power given by the will of another dies before the testator, the power is a nullity, and an attempted exercise of it by the intended donee is void."

And, as pointed out in *In Re McCurdy's Estate,* supra, (197 Cal. 276; 240 P. 498, 501), a power of appointment given by will cannot come into existence until the death of the giver of the power, and, if the donee, the only person who could exercise the power, is dead before that time, the power itself never comes into existence.

As Judge Cardozo put it in *In Re Fowle's Will,* supra, (222 N. Y. 222; 118 N. E. 611):

> "It is true that a power created by will lapses if the donee of the power dies before the maker of the will. * * * That is because a will has no effect till the death of the testator. Whatever power it creates, comes into being at that time."

It is to be observed that the Eighth item of the Deady will does not present an instance in which a testator has specificaly bequeathed property to

whomsoever another person has named in his will, thus bringing into operation the doctrine of incorporation by reference.

The Pennsylvania Court in *In Re Kirkpatrick's Estate, supra,* (280 Pa. 306; 124 A. 474), pointed out that the provision in the will there under consideration giving the first taker the right to select the charities which should have the property if the first taker died without children "necessarily visualizes" the first taker as living after the death of the testatrix.

In the NINTH item the Testatrix limits to a period of ten years after her death the division of income which she had made in the Fifth item between her grandsons and her son. (In the Fifth item she had provided that the division there made should continue during Henderson's lifetime). It is then provided that after the 10-year period the income remaining, after the payment of the specified monthly legacies to the Testatrix's daughters-in-law, should be distributed according to the ownership of the property (instead of at the rate of $100.00 per month to each of the grandsons with the remainder to Henderson as provided in the Fifth item). The grandsons owned a fee in one-third and Henderson owned a defeasible fee in two-thirds of the property. The Ninth item further directs that the Executors of the Will should, at their discretion, provide, out of the residue of the income bequeathed to Henderson in the Fifth item, funds "to further any legitimate or worthy ambition or aim * * which my gand-

sons * * may undertake or entertain."

In the TENTH item the testatrix devises to Henderson a specific parcel of real property, which is not mentioned in the Seventh item. *This Tenth item shows how the Testatrix dealt with a devise to Henderson which she intended to be absolute.*

By the ELEVENTH item the testatrix's library is bequeathed to Hanover.

The TWELFTH item gives the residuary estate two-thirds to Henderson and one-sixth each to Matthew and Hanover, without any qualifications.

In the LAST item of her will, the Testatrix appoints Joseph Simon and her son Henderson "to be the executors of this my Last Will and Testament, and also trustees to manage my estate", and appoints the Security Savings & Trust Company (now The First National Bank) to "complete the execution of said estate, and serve as trustee thereof" in the event of the death, resignation or disqualification of both said executors and trustees.

We now return to a discussion of the Seventh item of the will. *The ultimate question which the Court must decide in this case is what the testatrix meant in the Seventh item,* where she provides: "That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons." Giving the natural and reasonable meaning to this language, it would seem clear that the Testatrix meant that if

at the time of Henderson's death he had no issue the undivided two-thirds of Lot 1, Block 212, which had been devised to him in the Third item of the Will, "subject to the conditions, provisions and charges thereon hereinafter made", should thereupon go over to and vest in Matthew and Hanover.

It is contended by the plaintiff-respondent, however, that the Testatrix meant the gift over to be effective only if Henderson died without issue prior to the death of the Testatrix.

It will be observed that in the Seventh item the Testatrix provided that upon the happening of the contingency (Henderson's death), the undivided two-thirds should *"vest"* in her grandsons. Necessarily, the Testatrix was referring to a contingency occurring *after her own death.* Upon Henderson's death prior to her own death, and so prior the taking effect of her will, the property could not "vest" in Matthew and Hanover.

The Oregon Sureme Court, in *Love vs. Walker, supra,* (59 Or. 95; 115 P. 296) pointed out that the gift over provision in the will there under consideration provides that on the happening of the designated contingency the property should pass to the testator's remaining devisees in the proportion in which they "hold" the testator's estate, and observes that these devisees could not "hold" any part of the testator's estate until after the testator's death, and that consequently the testator must have referred to the first taker's death subsequent to his own.

So, only upon Henderson Deady's death occurring *after* the Testatrix's could the property "vest" at that time in Matthew and Hanover. The fact that Henderson in the Last item of the Will is appointed an executor and trustee of the Will, and that the substitute trustee is named merely to "complete the execution of said estate, and serve as Trustee thereof", is an indication that the Testatrix was grounding her will upon the assumption that Henderson would survive her. The authorities recognize that the appointment of the first taker as an executor of the will indicates that the testator, in providing for a gift over upon the death of the first taker, was referring to the first taker's death after that of the testator. See *Ahlfield vs. Curtis, supra,* (229 Ill. 139; 82 N. E. 276) and *St. Paul's Sanitarium vs. Freeman, supra,* (102 Tex. 376; 117 S. W. 425).

It is of interest to note that if Mrs. Deady had intended that the gift over should take effect only in the event of Henderson's death prior to her own, it would have been unnecessary to make a provision for a gift over to Matthew and Hanover, because that would have been the course of descent under the Oregon laws of descent and distribution.

In *Briggs vs. Hopkins, supra,* (103 Ohio 321; 132 N. E. 843) the Ohio Court found this an indication of the testator's intention that a gift over on "death without issue" should take effect on the death of the first taker after the death of the tesator.

In the present case, if Henderson had predeceased his mother without issue, Matthew and Hanover would have taken *both* the property devised to Henderson in the Third paragraph and that devised to him in the Tenth paragraph, although the condition contained in the Seventh paragraph applies only to the property devised by the Third paragraph. Mrs. Deady certainly intended, by the Seventh paragraph of her Will, that a condition should attach to the Third paragraph which was not applicable to the Tenth paragraph. Under the trial court's decree, exactly the same condition was attached to both—death of Henderson without issue prior to his mother's death.

TRUST

So far we have discussed the Deady Will as if Henderson received a legal estate in Lot 1, Block 212, and we have so far not taken advantage of the construction which must follow if legal title to Lot 1 passed to the trustees named in the will, and Henderson took only an equitable estate. If Henderson received only an equitable estate, that is, if the will set up a trust of the property, all the authorities agree that the gift over would refer to Henderson's death without issue *after the Testatrix's death,* unless other provisions in the will showed a contrary intention.

We think that the will did, without doubt, place the property in trust.

It is clear, of course, that there may be a conditional or defeasible *equitable* fee just as there may be a conditional or defeasible legal fee in real property. The Supreme Court of Oregon had such an estate before it in the case of Stubbs vs. Abel, supra, (114 Ore. 610; 233 P. 852). There the legal title was in the trustee and the court held that the beneficiary had a defeasible, equitable fee, which was defeated.

It is true that the Deady Will does not specifically in words devise the real property to the trustees; but it is clearly the law that the legal estate need not in terms be devised to a trustee in order to create a trust, if the intention of the testator to create a trust is manifested in the will. No technical language is necessary to the creation of a trust. The trustees under such circumstances will take such title as the purposes of the trust require. See the authorities cited on this point on pp. 22-3 hereof.

In addition to the fact that the Testatrix appoints two individuals and one banking institution as "trustees"—naming them as such—"to manage my estate", it is difficult to read the provisions of the Deady Will without reaching the conclusion that the Testatrix meant her trustees named therein to have title to the property and act as real trustees, because they could not otherwise perform the responsibilities imposed upon them by the Will. We refer particularly to the monthly payments to be made to beneficiaries; to the creation of a sinking fund, clearly within the discretion of the trustees; and to the discretionary payments to further any

"legitimate or worthy ambition or aim" of Matthew and Hanover. All the elements that go to make up a trust are present—the *res,* the *beneficiaries,* the *trustees* and the *duties of the trustees.* The duration of the trust was the *lives* of Henderson Deady and the Testatrix's daughters-in-law, Mary E. Deady and Marye Thompson Deady, mentioned in the Fifth item of the will.

INDEFINITE FAILURE OF ISSUE

It has also been contended that if the gift over be construed to take effect upon Henderson's death without issue *after* the death of the Testatrix, such would involve an indefinite failue of issue, and would therefore violate the rule against perpetuities. The argument is that the phrase means not what it says —a gift over upon death without issue—but a gift over when the issue left by the first taker becomes extinct.

This old common law rule of indefinite failure of issue was based upon the existence of estate's tail and the recognition of their validity. But estate's tail were abolished in Oregon even before Oregon became a state. *Lytle vs. Hulen,* 128 Or. 483, 506-509; 275 P. 45, 52-53.

We may therefore safely state that the rule of indefinite failure of issue is not in force in Oregon. The trial court reached same conclusion (Tr. 45-6, 61-2).

On the general subject of indefinite failure of issue, see 6 Columbia Law Review 175; 39 Yale Law Review 332.

EVIDENCE ON MEANING OF WILL

The construction which we place upon this Will differs so radically from that placed upon it by the trial court in ruling upon the motion to dismiss, that at the trial we felt justified in offering parol evidence, as an aid to construction. We feel, too, that no one can study the opinion of the learned trial judge on the motion to dismiss (Tr. 34-63) without being impressed with the difficulties encountered by the trial judge in construing certain phrases which by different courts and under varying circumstances have been given a variety of meanings.

We accordingly introduced at the trial evidence tending to show:

First: The feelings of love and affection of Mrs. Deady toward her grandsons, her desires with respect to her property, and related matters, as disclosed by her declarations and conduct during her lifetime.

Second: The construction placed upon the Will by interested parties, including Henderson, Charlotte, and Robert H. Strong, Henderson's Executor.

Third: Reliance by Matthew and Hanover upon representations made by Henderson, thus constituting an estoppel.

All the evidence offered at the trial was reported, subject to objections, rulings by the court being reserved, and is now in the record (Tr. 198-478). Subsequent to the trial the court rendered a memorandum on the admission of evidence (Tr. 112-30) in which disposition was made of this evidence as indicated in our Specification of Errors, supra, p. 10.

DECLARATIONS OF TESTATRIX

(a) Admissibility of the Evidence

We believe all evidence of declarations and conduct of Mrs. Deady offered by us, and rejected by the trial court, was admissible, to show the Testatrix's feelings toward her grandsons and her desires with respect to her property, if not as direct evidence of her intentions. In support thereof we rely upon the following authorities: O.C.L.A., Sections 2-214 and 2-218; *Crown Company vs. Cohn,* 88 Or. 642, 172 P. 804; *Schramm vs. Burkhart,* 137 Or. 208, 2 P. (2d) 14; *Stubbs vs. Abel, supra,* 114 Or. 610, 233 P. 852; *Calder vs. Bryant,* 282 Mass. 231, 184 N.E. 440, 94 A.L.R. 18; 94 A.L.R. 26, 263, 272, 280.

The above statutes, together with quotations from the above authorities, are set forth in Appendix "E", page 89.

(b) The Evidence

The learned trial judge in his opinion denying the motion to dismiss the bill of complaint stated as one of the reasons for the construction placed

upon the Will by him that Henderson was obviously the "favorite" (Tr. 61). This conclusion was based on the fact that the Will devised other property to Henderson outright. This fact, even though such other property were valuable, would not, in our opinion, justify a conclusion that Mrs. Deady intended Henderson to obtain an unconditional fee in two-thirds of the property here involved; but it later developed (Tr. 93) that all the other property of the estate, including a law library bequeathed to Hanover, was valued at only $1,347.00.

Limitations on space prevent us from detailing the evidence, or even giving a summary thereof, but we believe it will not be disputed that the evidence (which, of course, was introduced after the trial judge had stated that Henderson was the favorite) clearly shows that Henderson was not the favorite, but that Mrs. Deady was in fact disappointed in him, particularly with his domestic life (Tr. 268). It clearly shows that her grandchildren, Matthew and Hanover, were her favorites, and that to them she wished this property ultimately to go, to be held intact by them "as a monument to Judge Deady". See, particularly, Transcript, pages 260-8, 341-3, 380-401, 405-7, 411-5.

At the conclusion of the defendants' case and prior to rebuttal testimony by plaintiff, the trial judge gave an oral opinion regarding his conclusion on the facts, and among other things said:

> "I have arrived at the conclusion that the main point in Mrs. Deady's consideration at the time that she drew the will was that she desired to keep this property intact for an indefinite period of time, and that conclusion is borne out by the testimony in this case" (Tr. 454).

And the court added:

> "It is unfortunate, even in my own thinking, the main desire of the testatrix to hold this property, to give the benefit to her family in perpetuity, cannot be carried out, but I think it was a natural desire which was frustrated by the rules of law, . . ." (Tr. 454-5).

And in the court's final opinion, in referring to the desires of Mrs. Deady as disclosed by the above evidence, the court says (Tr. 120):

> "It is certain that she was impelled by a desire to have the property kept intact as a monument to Judge Deady, which is one of the clear expressions of the will."

CONSTRUCTION OF WILL BY HENDERSON DEADY AND OTHER INTERESTED PARTIES; REPRESENTATIONS BY HENDERSON, RELIANCE THEREON; WAIVER AND ESTOPPEL.

(a) Admissibility of the Evidence

The following authorities sustain our contention that evidence was admissible of the conduct and representations of Henderson Deady, the reliance of Matthew and Hanover thereon, of waiver and estoppel (all admitted by trial court), and of the representations and conduct of Henderson's executor, Robert H. Strong (rejected by trial court): O.

C.L.A., Sections 2-206, 2-210, 2-228; *Sperry vs. Wesco,* 26 Or. 483, 491, 38 P. 623, 625; 67 A.L.R. 1272, 1273, 1277; 94 A.L.R. 26, 245; *In re Estate of Daniel Kelly,* 177 Minn. 311, 225 N.W. 156, 67 A.L.R. 1268, and cases cited; *Stubbs vs. Abel, supra,* 114 Or. 610, 623-4, 233 P. 852, 856-7; *Moore vs. Moore,* 121 Or. 48, 56, 252 P. 964, 967.

These statutes, together with quotations from the above authorities, are set forth in Appendix "F", page 94.

(b) Evidence

The testimony on the representations of Henderson and, after his death, of his Executor, may briefly be summarized by stating that at no time prior to the death of Henderson on May 28, 1933, and indeed at no time prior to the death of Charlotte, July 12, 1935, had anybody ever asserted or claimed that after Henderson's death without children Hanover and Matthew would not own the property in fee simple (Tr. 332), and repeated declarations had been made to the contrary.

It will be recalled that under the Fifth paragraph of the Will payments of the residue of the income were to be made to Henderson only after the monthly payments to the widows and to Matthew and Hanover, and after the payments of inheritance taxes, and after the creation of a sinking fund for retirement of the mortgage, and, under the Ninth paragraph, after the payments of any discretionary funds for the furthering of any

"worthy ambition or aim" of Matthew and Hanover.

It will thus be seen that since all of the above sums were payable prior to the payment of any sums to Henderson, the payment of income to him might be deferred several months, and thereafter the amount of his income might be seriously curtailed by carrying out the provisions for the sinking fund for the mortgage and the provision providing funds for some "legitimate or worthy ambition or aim" of the two grandsons. Accordingly, very shortly after the death of Mrs. Deady, Henderson requested Hanover and Matthew to agree to a modification of the provisions of the Will by waiving some of these priorities, and particularly by postponing the carrying into effect of the sinking fund provisions (Tr. 340). Hanover testified that Henderson "kind of led up to finally what he did ask me for, that he needed some money, wanted some money to live off of . . . and Mr. Simon said that it would be all right if he got the consent of Matthew and I" (Tr. 274). As Henderson's argument why Hanover and Matthew should consent to such an arrangement whereby Henderson could get more money, and sooner, "he also expressed that inasmuch as Matthew and I were coming into the property some day ourselves, why, he thought it was only fair that he should get something to live off of", and Henderson also said, "I can't come into the property unless I have children, as you know, and I will never have any children, because I am a sick man, I can't have children" (Tr. 275).

At an early stage of these discussions Hanover consulted an attorney, Ralph W. Wilbur, who on October 25, 1923, wrote a letter to Mr. Simon (Ex. A, Tr. 445), setting forth the position of the grandsons and stating that a "rumor" had come to him that Henderson wished to obtain advances from the estate (Tr. 446). We digress to call attention to one paragraph of that letter which it seems to us was entirely misunderstood by the trial judge. After discussing in detail the provisions of the Will referring to the monthly payments to beneficiaries, the letter says (Tr. 448):

> "It is naturally for the interests of my clients and particularly the two grandsons to have as large a sinking fund created as possible so as to pay off the mortgage, as under present family conditions, as I understand them, under Paragraph 7, the two grandsons will probably eventually own this whole property."

Referring to this letter the learned trial judge said in the final opinion (Tr. 131):

> "Controversy seems to have sprung up immediately, concerning the distribution of money and the ownership of the property, between Henderson and Hanover. Wilbur, the attorney for Hanover and Matthew Edward wrote a letter to Joseph Simon, October 25, 1923, *setting up a claim* that the grandsons would be entitled to the whole estate on Henderson's death, and Joseph Simon answered October 26, 1923." (Italics added.)

We submit that the learned trial judge has entirely misconstrued the meaning of Mr. Wilbur's letter. There was no controversy. Mr. Wilbur was

not asserting a "claim". He was merely calling attention to the fact that "under present family conditions" the two grandsons "will probably eventually own this whole property." The making of that assertion created no controversy. In fact, that was the one matter on which there was entire agreement—that when Henderson died without issue the two grandsons would come into complete ownership of the property, subject only to the charges placed thereon by Mrs. Deady's Will. Not until long after Henderson's death was any suggestion to the contrary put forward by anybody.

At any rate, due to the exhortations and requests of Henderson, and after conferences between the parties and their attorneys, stipulations were entered into from time to time whereby the provisions in the Will for the creation of a sinking fund were suspended and Henderson was given definite monthly payments in excess of what he otherwise would have received, in the absence of such stipulations. See Exhibit I (Tr. 278), dated December 18, 1923; Exhibit J (Tr. 281), dated October ..., 1924; Exhibit K (Tr. 324), dated August ..., 1931; and Exhibit E (Tr. 307), which will be discussed later, dated October 28, 1925.

As a result of these stipulations payments were started in December, 1923; and those to Henderson were at the rate of $300.00 per month, and were increased to $400.00 per minth in February, 1925, to $475.00 per month in December, 1925, to $500.00 per month in March, 1927, to

$750.00 per month in June, 1928, reduced to $400.00 per month in February, 1931, and increased to $600.00 per month in July, 1931, at which amount they continued until the date of his death, May 28, 1933 (Tr. 90). And because of the extent of these payments, although the Will provided that a sinking fund "of not less than $1,000.00 nor more than $2,500 per year" should be created for the purpose of paying the mortgage debt, no sinking fund was created and no payments of principal whatsoever were made on the mortgage debt until December, 1930, and at the time of Henderson's death in May, 1933, there had been paid upon the principal sums totaling only $7,000 (Tr. 92). The cash balances in the hands of the Executors during this time were always small (Tr. 91). It is, of course, clear that payment to Henderson of funds that otherwise would have been used to retire the mortgage debt was a detriment to Hanover and Matthew, and this regardless of whether they now own the entire property in fee or only an undivided one-third interest therein.

Shortly after Mrs. Deady's death, Marye, Paul's widow, put forth the contention (Tr. 89, 281-305) that, by reason of the manner in which Mrs. Deady had obtained title to the property after Judge Deady's death, the three sons had what amounted to a vested remainder subject to a life estate in Mrs. Deady, and that, accordingly, she, Marye, as Paul's widow, was entitled to his one-third. Our course if this contention had prevailed, Matthew and Hanover

would be the owners of a one-third interest free from monthly payments to others; but Henderson, in urging the boys and their mother to oppose Marye's contentions, argued that under the Will the boys would, upon Henderson's death, own the entire property (Tr. 288-9). After suit was filed, in which Marye's contentions were opposed by Matthew and Hanover as well as by Henderson, the matter was settled by an agreement (Ex. E, Tr. 307) increasing the monthly benefits to Marye and extending them for the remainder of her life instead of, as provided in the will, until she remarried (Ex. E, Tr. 307).

In the stipulation of December 18, 1923, Exhibit I (Tr. 278) there is a reference to a "controversy" regarding the "ownership of the real estate", and it should be understood that that reference is to the controversy by which Marye claimed a one-third interest in the property (Tr. 284-5).

During the two years subsequent to Mrs. Deady's death that Henderson was in Portland, he succeeded in obtaining a divorce from his then wife, Amalie. In negotiations for this settlement both Henderson and his attorney, Chester Dolph (who was a witness to Mrs. Deady's Will), insisted in their negotiations with Amalie's attorney, Samuel B. Weinstein (Tr. 39), that Henderson "had no substantial resources" (Tr. 225), and that under the terms of his mother's Will all that Henderson had "was a power of appointment, that that power of appointment must be exercised in favor of his wife" (Tr. 226), and

Henderson stated that he would decline to exercise that power of appointment in favor of Amalie "unless some reasonable arrangement could be arrived at" (Tr. 226, 233). However, it was understood that Henderson contemplated remarrying as soon as the law would permit, and an agreement was entered into (Tr. 241) whereby Amalie was to be paid certain sums on an ascending scale beginning at $75.00 per month and reaching $200.00 per month after three years; and Henderson agreed (Tr. 235, 244) to exercise the power of appointment "in such manner and to the effect that the payments herein provided to be paid by him to the said Amalie B. Deady shall be a fixed and prior charge upon the devise, estate, legacy, or interest resulting from the exercise of said power by him"—this being accomplished by Charlotte agreeing to make such payments from such income after the death of Henderson. Based upon this agreement Henderson obtained his divorce. This agreement was entered into September 14, 1925, approximately a month before the agreement settling Marye's controversy, Exhibit E (Tr. 307), which was executed October 28, 1925.

Between the dates of the above two agreements—that with Amalie and that with Marye—another matter arose. Henderson, as we have pointed out, in connection with the execution of the various stipulations, had continuously been citing the fact that upon his death the two boys would obtain the entire property in fee simple. However, rumors had come to the attention of Hanover that Charlotte had had

a child by Henderson. It occurred to Hanover that if such was the case Henderson would probably not "die without issue", and accordingly Hanover and his brother would not come into ownership of the two-thirds interest upon Henderson's death. Accordingly, shortly before October 28, 1925, when the Marye agreement was signed, this fact was mentioned to Henderson by Hanover (Tr. 316). And Henderson said "he didn't have any children by anybody, it wasn't so." At Hanover's request Henderson provided an affidavit, dated October 29, 1925, 1925, which, omitting the formal parts, reads as follows (Ex. H, Tr. 322):

> "I, Henderson Brooke Deady, being first duly sworn, say on oath, that I am a son of Lucy A. H. Deady, deceased, and one of the heirs at law of her Estate. I further depose and say that no child or children have ever been born to me, and that I have not had and have not now any issue by marriage or otherwise."
>
> "Henderson Brooke Deady."

The trial court in its final opinion (Tr. 140-2, 147-8) explains Henderson's assertions in the controversy with Amalie and also the above affidavit by stating that if Henderson died before marrying Charlotte, but after his divorce from Amalie, Hanover and Matthew would be his heirs and would inherit his two-thirds interest in the property, and for this reason they were interested in knowing whether he had any children. But we confidently state that there is not an iota of evidence justifying such a conclusion. The evidence is clear that Matthew and

Hanover were concerned with the question of Henderson's possible issue only because of the provision in the Will that if Henderson "die without issue" they would obtain the property.

Shortly before leaving for the East, and after he had obtained his divorce, and after the above affidavit was executed, Henderson endeavored to persuade Hanover to make an agreement whereby if Henderson died before he married Charlotte—and thus before he could execute the power of appointment in her favor—Charlotte would nevertheless be taken care of from the income from the property (Tr. 320, 418), but Hanover indignantly refused to enter into any such agreement.

Henderson died on May 28, 1933, "having had no issue and leaving no issue him surviving" (Tr. 80). Sometime thereafter Hanover was in Joseph Simon's office discussing matters generally concerning the estate, and Mr. Simon "made the remark that they were getting too much money back there", which Hanover construed to mean Amalie and Charlotte Deady. He inquired further, but Mr. Simon, very properly, said, "I can't do anything, Hanover. I am the Executor of the will. You will have to see somebody else" (Tr. 376). Those remarks started a "train of thought" (Tr. 329, 347-53, 363-5, 376). So he consulted Ralph Wilbur. As a result of this conference Mr. Wilbur wrote a letter to Mr. Simon (Exhibit 9, Tr. 469). After pointing out that since Henderson died without issue "there can be no question but what the ultimate title to this property will vest

in and probably has already vested in the two grandsons", he suggested "an interesting question" as to whether the fact that Henderson had died during the ten-year period prevented an exercise of the power of appointment. Hanover at the trial denied that any such idea had been in his mind, or that he had suggested it to Mr. Wilbur (Tr. 349-50). After negotiations, Mr. Wilbur, on behalf of the grandsons, prepared a compromise agreement but it was rejected (Tr. 330-1). A counter proposal was executed by Charlotte and forwarded to Mr. Wilbur, who apparently approved it. It was signed by Matthew Deady. However, when Hanover went to Mr. Wilbur's office and read it he refused to sign it "because it was the same thing that the will covers" (Tr. 331). Asked what he meant by this he explained (Tr. 332):

> "Well, that Charlotte Deady should receive two-thirds of the income for her life, as given Henderson the right to give her at the time of his death, and it didn't give Matthew and I any more money out of it. It also was agreed that we owned the property, the same thing as the will said."

Up to that time he testified nobody had ever asserted or claimed that after Henderson's death without issue Matthew and Hanover would not own the entire property (Tr. 332).

The agreement which Hanover refused to sign is in evidence (Exhibit G, Tr. 456, erroneously referring to as Ex. K by appellants' counsel, Tr. 328, 331). Referring to this exhibit the trial court in its

final opinion said, with respect to Hanover, "he could have settled this dispute by a stroke of the pen" (Tr. 149). This is correct, and it emphasizes the reason why we introduced the exhibit. It gave to Charlotte the utmost which by a favorable construction of the will she was entitled to receive (and which she thereafter received until her death, without an agreement (Tr. 90-2)). And Hanover did not sign it because he felt it gave Matthew and him nothing. The proposed release by Charlotte of any interest in the property, beyond the right to income for life, was but releasing to the grandsons that which they had been repeatedly assured was already theirs (Tr. 333-4).

Indeed, on June 30, 1933, Robert H. Strong, named by Henderson as his executor, had filed a petition in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, for the probate of Henderson's will. The executor's attorney in the probate proceedings was Robert F. Maguire, the appellee Howell's attorney in this case. In this petition Strong represented that Henderson died leaving an estate in Multnomah County "consisting of Lots 16 to 21, both inclusive, in Block 3, Mountain View Park No. 2, Multnomah County, Oregon, of the approximate value of $100.00 and with an annual rental value of not exceeding $5.00, and the right of appointment and bequest to his then wife, Charlotte Howell Deady, of the income from two-thirds of Lot 1, Block 212, City of Portland, State of Oregon, for and during the term

of the natural life of the said Charlotte Howell Deady." Henderson had executed his will October 22, 1932 (Ex. 1, Tr. 199). In that will he expressly referred to the power of appointment given him under the Eighth paragraph of his mother's Will, and exercised it in favor of his wife, Charlotte (Tr. 199-200). Almost two years after filing the petition for probate of that will, the Executor, Robert H. Strong, filed the inventory and appraisement (Ex. B, Tr. 214), in which he swore that the only assets of the estate consisted of the above described lots in Mountain View Park with a value of $100.00 (Tr. 217). The trial court held both the petition and the inventory and appraisement to be inadmissible in evidence (Tr. 121). However, under the Oregon statute an executor is entitled to possession of the real property of the deceased "and to receive the rents and profits thereof" during the course of administration (O.C.L.A., Section 19-301). It is his duty to report assets for State Inheritance Tax purposes (O.C.L.A., Sec. 20-146) and to file returns and make payment of the Federal Estate Tax (26 U.S.C.A., Secs. 821-2). Under the authorities to which we have already referred, Robert H. Strong, as executor, was accordingly interested in a construction of the Will and his construction thereof is persuasive evidence of its meaning.

Likewise, when upon Henderson's death, the question of an additional inheritance tax arose, all parties acted on the assumption that the only mat-

ter involved was the power of appointment. All negotiations with respect to the additional inheritance tax was on the basis that this tax was due from the estate of Lucy A. H. Deady, and it was so paid (Tr. 429-442), which, of course, that estate did not owe if, as appellee contends, Charlotte was entitled to the income as a devisee of Henderson's estate rather than as an appointee of the power of appointment created by Mrs. Deady's will.

The will of Charlotte (Tr. 201) also indicates very clearly that she did not believe, when she executed her will in May, 1933, that her husband then had a two-thirds interest in this valuable property which some day would be inherited by her. In her will she provides that in the event her husband predeceases her she gives all her property to her son, Richard Howell Busck, also known as Richard Howell, the present appellee. She says: "I make no provision for my daughter, Karen Busck, in this, my last Will and Testament, because she has arrived at her majority and has received her education and is self-supporting" (Tr. 202). We do not believe that in giving that reason for giving nothing to her daughter she believed she was disinheriting her daughter of an interest in an estate consisting not only of the 60-acre farm in Connecticut mentioned in her Will, but also of a two-thirds interest in real property in Portland, Oregon, valued at $300,000.

OPINIONS OF TRIAL COURT

The trial court rendered three opinions, one on the Motion to Dismiss the Amended Bill of Complaint (Tr. 34-63), one on the admissibility of evidence (Tr. 112-130), and a final opinion discussing the effect of the evidence offered at the trial (Tr. 130-52). Due to limitations of space, the comments we have already made will have to suffice regarding the last two of these opinions, and also with regard to the greater portion of the opinion on the Motion to Dismiss the Amended Bill of Complaint. However, we wish here briefly to analyze the process of reasoning by which the learned trial court arrived at the conclusion, embodied in the decree (Tr. 179), that the only effect of the Seventh paragraph of the Will was to substitute Matthew and Hanover for Henderson in the event that Henderson died without issue *prior* to the death of Mrs. Deady—that if he outlived her he obtained an absolute indefeasible fee.

The court in its opinion, as we have already pointed out, rejects the possibility that the words "die without issue" would be construed in Oregon to import "indefinite failure of issue" (Tr. 45-6, 61-2). With this conclusion we, of course, agree.

The trial court then explored the possibilities to determine which of three possible intentions was expressed in the Will (Tr. 45)—whether the gift over was to take effect in the event of (1) "death at any time", or (2) death at some "intermediate

date", or (3), as a "substitutional gift", death prior to Testatrix's death. Citing *Britton vs. Thorton, supra,* 112 U.S. 526, 533, and other cases, the court notes (Tr. 47) that "in many jurisdictions" the Seventh paragraph of the Will would be construed to mean that Henderson's title would pass on his death "whenever that occurred" to the grandsons "if no other intention were expressed as to this by the will". This, of course, is the construction which we urge, and we again call attention to the fact that *Britton vs. Thornton, supra,* has been twice quoted with approval by the Supreme Court of Oregon and cited with approval in one other case. The trial court, however, also states (Tr. 53) that a principle "widely accepted" is that an "intermediate date" should be selected unless the will indicates a contrary intention. The trial court says (Tr. 53) "all in all, the wishes of most testators are best interpreted by choosing an 'intermediate date' "—again citing, and quoting, *Britton vs. Thornton, supra,* which we respectfully submit stands for no such principle. Certainly that case cannot stand for both of the above propositions, for they are mutually inconsistent.

Having thus concluded that the Testatrix intended by the Seventh paragraph that the limitation over to Matthew and Hanover was to occur not on the death of Henderson "at any time", but at his death prior to an "intermediate date", the court endeavors to find such intermediate date. The court says (Tr. 55) :

> "Unless, therefore, a clearly valid 'intermediate date', consistent with these limitations can be found, no devise over should be given effect, but the primary grant should be absolute."

The court discusses at some length the twenty-five year restraint on alienation, contained in the Sixth paragraph of the will, and concludes that this twenty-five year period is the "outstanding feature of the will" (Tr. 52) and the "salient factor of the will" (Tr. 59). The opinion reasons that "the express condition against alientation and the limitation over on death without issue are mutually interdependent" (Tr. 56). It then states that if Henderson had outlived the twenty-five year period, "he would have taken the fee title, as above noted" (Tr. 56). But since the court holds that the twenty-five year restraint on alienation is void, the court reasons that the "executory devise dependent either upon his death without issue during the time when this condition fettered enjoyment, or after the expiration of the unreasonable period of twenty-five years would be void" (Tr. 57). Therefore the court "arrives at the conclusion that no valid 'intermediate date' can be chosen which will give validity to the executory devise" (Tr. 59-60). And from this the court concludes that the intention of the Testatrix must have been a substitutional intent, and that since Henderson outlived the Testatrix he took an absolute indefeasible fee simple title (Tr. 60-3).

Briefly our answer to the court's reasoning is as follows:

First: In Oregon, as elsewhere, a will should be construed if possible so as to give it a legal, and not an invalid, result. *Closset vs. Burtchaell,* 112 Or. 585, 602, 230 Pac. 554, 560.

Second: We respectfully disagree with the statement of the learned trial court (Tr. 53) that there is "widely accepted" any principle that the courts will construe a will if possible so as to make the limitation over dependent upon the death of the first taker at some "intermediate date". On the contrary, we state that no such rule exists, certainly not in Oregon. The case of *Britton vs. Thornton, supra,* cited by the court (Tr. 47, 53), does not, as we have pointed out, support such a proposition. The trial court's opinion says that this principle is a corollary of a rule "of many jurisdictions" that where the executory devise "upon the death of the first taker without children is postponed by an estate for life or for years . . . the executory devise is dependent upon this date". (Tr. 52-3). But in *Bilyeu vs. Crouch, supra* (96 Or. 66, 189 P. 222). already discussed above, where the "first taker's" estate was postponed by a life estate, the court held that the limitation over was *not* dependent in time upon the death of the life tenant. Although the "first taker", Frank Ingram, outlived the life tenant, the court held that his death thereafter without issue terminated his estate and gave effect to the executory devise over. And in other cases also the Oregon court has disregarded the "intermediate date" theory stressed by the trial court. It disregarded

it in *Love vs. Walker, supra* (59 Or. 95, 115 P. 296), where as here there was an alleged "intermediate date" of distribution to the beneficiaries, Judge Burnett alone dissenting on this point. And in *Imbric vs. Hartrampf, supra* (100 Or. 589, 198 P. 521), in holding that the first taker obtained an indefeasible fee it did so without reference to an "intermediate date" which was suggested in a specially concurring opinion by Judge Burnett. It should be noted that Judge Burnett delivered the opinion of the court in *Bilyeu vs. Crouch, supra.*

Third: But even though it should be assumed, as the trial court concluded, that the devise over to Matthew and Hanover upon the death of Henderson without issue was controlled by the twenty-five year period, it certainly does not follow that the limitation over is void. Whether that event, the death of Henderson, must occur, within the meaning of the Will, within a period of twenty-five years, or whether it is sufficient that it occur "at any time", it is nevertheless *the death of Henderson* ("a life in being") which gives effect to the executory devise. If Henderson had survived twenty-four years after the death of his mother, his death would obviously have been within a life in being. Conversely, if he had died immediately after his mother's death, the executory devise to the grandchildren would then immediately have vested. In this latter case it may be that the grandchildren would not have been entitled to possession of the real property until the end of the twenty-five years, or even

later. But as recognized in the trial court's opinion (Tr. 57), the rule against perpetuities is concerned not with the enjoyment, or possession, of estates, but with the *vesting* thereof. See *Closset vs. Burtchaell, supra* (112 Or. 585, 606-9, 230 P. 554, 561-2). Under no possible construction of the Will, even adopting the trial court's "intermediate date" theory, could the two-thirds interest vest in the grandsons at a period later than that provided in the rule against perpetuities—a life or lives in being plus twenty-one years. See *O'Hare vs. Johnston,* 273 Ill. 458, 113 N.W. 127; *In re Rousseau's Estate,* 48 S.D. 501, 205 N.W. 222; *Swain vs. Bowers,* 158 N.E. 598 (Ind. App.); and *Closset vs. Burtchaell, supra.* Accordingly, even though we adopt the construction reached by the trial court that the devise over to Matthew and Hanover was dependent upon the death of Henderson within twenty-five years, the devise over is not void, but is valid.

It should be particularly noted that the learned trial judge accepted the "substitutional gift" doctrine only as a last resort. He adopted it only because he failed to find, from the language of the will, a valid "intermediate date". In this respect we respectfully submit that the learned trial judge committed grievous error. He erred in holding that, on a proper construction of the will, the executory devise was dependent not on Henderson's death "at any time", but on his death prior to the "intermediate date" of twenty-five years; but having so found, he further erred in holding that an executory devise

dependent upon Henderson's death within a period of twenty-five years was void. And only because he so held did he adopt the "substitutional gift" doctrine.

ABSENCE OF NECESSARY PARTIES

The Fifth defense (Tr. 68) of the Answer alleges that the estate of Henderson Deady, through whom the plaintiff-respondent claims, has not been closed, and raises the point that there is an absence of an indispensable party, the executor of Henderson's estate, without whom the case could not be tried. The District Court did not consider Henderson's executor a necessary party (Conclusions of Law 8, Tr. 176).

Under Oregon statutes (O.C.L.A., Secs. 19-301 and 19-1202) an executor is entitled to the possession and control of real property and to the rents and profits thereof, to the exclusion of heirs and devisees. The Oregon Supreme Court has held that the administrator and not the heirs is the proper party to sue for injury to the real estate. *Boyer vs. Anduiza,* 90 Or. 163, 165; 175 P. 853. And this court has held that a devisee, in Oregon, cannot bring ejectment while the estate is in the process of administration. *Bilger vs. Numan,* 199 Fed. 549, 561 (9th Circ.).

It would seem clear that the issues raised by and the demands of the appellee in this suit cannot be litigated without the presence of the executor of

Henderson's estate, and that this suit should be dismissed because of the absence of that indispensable party.

There is nothing in the record to indicate that Henderson's executor was requested to bring or join in this suit, but, if such were the case and he refused to comply, he would nevertheless be an indispensable party whom the appellee should have been compelled to bring in.

CONCLUSION

As we said at the outset, to us this case seems simple. It becomes complex only when something is read into the will which is not there, when an intention is imputed to Mrs. Deady which everybody knows she did not have.

She wanted this property to remain in the family "as a monument to Judge Deady". When her last surviving son—for whom she provided so generously during his lifetime—should die, she wished her only grandchildren to have the property.

To her three sons' widows she desired to provide a monthly income during their lifetime, but no more. That this was the full extent of her gifts to the widows of Paul and Edward is, of course, manifest; and no one can assert that her feelings toward Charlotte were more kindly than toward Mary and Marye. In fact, Charlotte was not yet the wife of

Henderson either when the will was executed or when Mrs. Deady died, and Mrs. Deady's attitude toward her was, to put it mildly, one of disapproval (Tr. 269). And yet appellee contends that although Mrs. Deady desired the widows of Edward and Paul to receive but a small fraction of the income for life ($150.00 per month and $75.00 per month, respectively), it was her intention that immediately upon Charlotte becoming Henderson's widow she should become vested with an absolute fee simple title to two-thirds of the entire property.

The will clearly intended no such result. Not until both Henderson and Charlotte had passed on did anybody interested in its provisions assert that it did. On the contrary, they all construed it to mean what Mrs. Deady intended it to mean—that upon Henderson's death without issue title to the entire property should "vest in my grandsons", Matthew and Hanover. Henderson's repeated assertions that by reason thereof Matthew and Hanover would eventually be sole owners of the property were accepted by them as reason enough for them to consent to payments to Henderson even in excess of the liberal provisions for him in the will.

This desire of the testatrix, so clearly (we submit) expressed in her will and accepted by Henderson during his lifetime, and in his own will, and by his executor ever since, cannot now, justly or lawfully, be frustrated. Certainly not in a state like Oregon, whose Supreme Court has so often insisted

that the sole function of the court in this type of case is to ascertain "the true intent and meaning of the testator", and, if lawful, to enforce it.

Respectfully submitted,

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APPENDIX A

Last Will and Testament of Lucy A. H. Deady, deceased (Tr. 4-9).

"IN THE NAME OF GOD, AMEN: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

"First: I will and direct that all my just debts and funeral expenses be paid.

"Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

"*Third*: *Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One* (1) *in Block numbered Two Hundred and Twelve* (212) *of the City of Portland, Oregon.*

"Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

"Fifth: I direct that from the income derived from said Lot numbered 1 in Block numbered 212, there be paid to Mary E. Deady, wife of my deceased son, Edward Nesbith Deady, the sum of $150.00 per month during the term of her natural life, and that there be paid to Mary Thompson Deady, who was the wife of my son Paul R. Deady, the sum of $75.00 per month, so long as she survives and remains unmarried.

"I further direct that the remainder of the income derived from real property, shall be distributed as follows:

"(a) To the payment to each of my grandsons, Matthew Edward Deady and Hanover Deady, the sum of $100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

"Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking fund of not less than $1000.00 nor more than $2500.00 per year, in discretion of my executors for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

"Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

"*Seventh*: *That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered* 1 *in Block*

numbered 212, shall rest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

"Eighth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady.

"Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

"Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

"Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

"Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatsoever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Henderson Brooke Deady the undivided two-thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

"Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees herein named, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

"I hereby revoke all former Wills by me at any time made.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 29th., day of July, A. D. 1920, at Portland, Oregon.

Lucy A. H. Deady (Seal)

"The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

Chester V. Dolph, Residing at Portland, Or.
J. V. Beach, Residing at Portland, Or."

APPENDIX B

Quotations from Cases Cited on Page 20 of the Brief on the Subject of "Cutting Down the Fee".

In *In re Briggs' Estate,* 186 Cal. 351; 199 P. 322, 324, the California Supreme Court said:

> "In support of his contention that the second clause is repugnant to the first, in that it is contradictory and inconsistent, respondent argues that the testatrix by the first clause created an absolute estate; that the second clause in cutting down the estate becomes repugnant to the first clause which creates it absolutely. We think the effect of the second clause is not to cut down an absolute estate which may have been created by the first, but merely expresses one phrase of her testamentary intention. Neither clause is complete within itself, but together they create a limited fee."

In *In re Barrett's Estate,* 85 Neb. 337; 123 N.W. 299, 301-302, the Supreme Court of Nebraska (which state has a statute like Oregon's O.C.L.A., Sec. 18-603) said:

> "* * * nor, considering the entire instrument, does it seem reasonable to hold that the testator intended to vest in indefeasible estate in fee simple in his son. It is argued that to hold that the will creates a valid executory devise is to say that the son received a mere life estate, and that, if such an estate were intended the testator would have used words to express that intention. The vice of this argument is that the devise over does not cut down the first taker's estate to one for life. John M. Barrett's title was a base or determinable fee, which is defined

> by Kent as 'an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent.' * * * We are satisfied that, when all of the provisions of the will are read together, there is no repugnancy between them * * *."

The Oregon Supreme Court said in *Rowland vs. Warren*, 10 Or. 129, 131:

> "The devise in the first clause of the will, therefore, gave Mary E. Hembree either a fee simple absolute or a fee simple conditional. It remains to be seen what qualification has been annexed to the estate by the last clause in the will."

APPENDIX C

Quotations from *Stubbs vs. Abel,* 114 Or. 610; 233 P. 852, cited on page 21 of the brief, on the point of defeasible fee.

114 Or., p. 624-6; 233 P., p. 857:

"The will of Richar l Williams, so far as is material to this opinion, reads:

* * * * * * * *

'Sixth: All the rest, residue, and remainder of my property, real and personal, of every description, I give, devise and bequeath, to my daughter, Edith W. Stubbs, one-half thereof, and to Richard C. Williams and Claire S. Williams one-half thereof, subject, however, to such disposition as I may hereinafter make of any portion thereof.'

* * * * * * * *

"The next provision constitutes the pivotal point of the case, and the meaning expressed therein is decisive of this cause. It reads:

'Should any one of my grandsons die before receiving the legacy herein provided for him, such portion as he would otherwise have received shall go to his surviving brother. Should both brothers die before arriving at the age to receive the legacy or legacies provided for them, then such legacy or legacies that would otherwise have gone to them shall become a part of the residuary legacy herein provided in the sixth paragraph of this will.' "

114 Or., p. 633; 233 P., p. 859-60:

"To sustain the position of the appellants, the court would be compelled to mutilate the testator's statement of his expressed intent and give

effect to one clause, or part thereof, and deny all effect to the testator's expressed qualification or condition attached to such devise. While the testator could not have made two repugnant, valid, devises, it was within his power to devise a conditional, defeasible or determinable fee, * * *. In plain language, he gives his two grandsons notice that their title to the property bequeathed and devised by paragraph 6 of the will is subject to any lawful 'disposition' that the testator might 'hereinafter make.' The testator then proceeded to make a disposition of that property that plainly shows that Claire S. Williams never possessed more than a qualified or defeasible fee in the real property involved herein."

APPENDIX D

Quotations from cases, cited on page 26 of the brief, on the point that even in jurisdictions holding that the phrase "die without issue", standing alone, indicates death prior to testator's death, the courts hold that the *slightest indications* in the will overcome this presumption and show that the intention is death at any time.

In *In re Barrett's Estate,* 85 Neb. 337; 123 N.W. 299, the court said:

> "The rule that the words of limitation shall be applied to the death of the first taker without issue during the life of the testator is said to be extremely technical in its character and does not apply where there are indications, however slight, that the testator referred to death subsequent to his own demise."

In *Vanderzee vs. Slingerland,* 103 N.Y. 47; 8 N.E. 247, the court said:

> "But the rule established by the courts applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue, or other specified event. Indeed, *the tendency is to lay hold of slight circumstances in the will to vary the construction,* and to give effect to the language according to its natural import". (Italics added.)

In *In re Haydon's Estate,* 334 Pa. 403, 6 A. (2d) 581, the court said at page 583 of the Atlantic Reports:

"Where an absolute estate is devised followed by a gift over in the event of the death of the donee without issue, the rule of construction that is applied in the absence of a contrary intention is that the gift over will be construed as referring to death without issue in the lifetime of the testator. Mickley's Appeal, 92 Pa. 514; In re Lerch's Estate, 309 Pa. 23, 159 A. 868. But where the will indicates that the testator contemplated that the death of the legatee without issue might occur after his own death this rule of construction does not apply. As we said in Re Mebus' Estate, 273 Pa. 505, 516, 117 A. 340, 343: 'The rule is never applied where the first takers referred to are treated as living at a period subsequent to the death of the testator'. In the instant case the provisions that the Trustee should pay the interest from the two funds to the daughters during their lives indicates conclusively that the testator regarded them as surviving him, for it is obvious that the duty to make the payments could not rise until after the testator's death.

"Hence it is apparent that the testator did contemplate that the event of dying without issue might occur after his own death."

APPENDIX E

Quotations from Oregon Statutes, Cases, and A.L.R. Annotations, Cited on Page 52 of the Brief, Respecting the Admissiblity of Declarations and Conduct of Lucy A. H. Deady, the Testatrix.

O.C.L.A., Sec. 2-218, provides as follows:

> "**Consideration of circumstances.** For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subect of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

O.C.L.A., Sec. 2-214, provides as follows:

> "**Evidence of terms of agreement reduced to writing.** When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:
>
> (1) Where a mistake or imperfection of the writing is put in issue by the pleadings;
>
> (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 2-218, *or to explain an ambiguity, intrinsic or extrinsic,* or to establish illegality or fraud. The term 'Agreement' includes deeds and wills as well as

contracts between parties." (Italics added.)

The above statute is copied from California Code Civ. Proc., Sec. 1856, except that in the California statute the above-italicized portion of the Oregon statute reads: "or to explain an *extrinsic* ambiguity".

In *Crown Company vs. Cohn,* 88 Or. 642, 655; 172 P. 804, 808, the Oregon Supreme Court said:

> "In construing the terms of a trust deed, the purpose of a court should be to ascertain the trustor's intention which design is to be determined from an inspection of the entire language of the conveyance. If the words thus employed are plain and unambiguous there is no necessity for judicial interpretation.
>
> 'But where the instrument is indefinite or inconsistent, the court can look at the declarations of the donor and consider the surrounding circumstances in determining just what the intention of the donor was': 39 Cyc. 197."

Again in the same case (88 Or. at p. 656; 172 P. at p. 809):

> "Construing together the clauses referred to a latent ambiguity is manifest, as to the means to be adopted to accomplish the purpose clearly intended. In view of such uncertainty the testimony of the several defendants, and that of the attorney who at Mrs. Friendly's request prepared the trust deed, was properly received, showing that the provisions of the first clause of the conveyance were intended by the trustor to be incorporated in, and read in connection with all the other clauses when necessary to a proper execution of the power conferred."

Calder vs. Bryant, 282 Mass. 231; 184 N.E. 440; 94 A.L.R. 18, at pp. 22-3:

"Extrinsic evidence of the conduct and the declarations of the testator is competent. They are not to be deemed direct proof of testamentary intention, but as showing the testator's relation to, and state of feeling towards, any of the respective claimants."

Annotation: "Admissibility of Extrinsic Evidnce to Aid Interpretation of Will", 94 A.L.R. 26:

p. 263:

"Although the authorities do not warrant any such broad or unqualified statement of the rule, it has been frequently laid down as a general rule that evidence of declarations by the testator is not admissible to aid in the construction of a will."

p. 272:

"It is well settled that extrinsic evidence generally is not admissible to control the construction of an unambiguous will, or to vary, contradict, or add to the terms of a will. These principles apply a fortiori where the evidence offered consists of the testator's declarations of intention."

pp. 280-281:

"Where the declarations are offered not to show direct expressions of intention by the testator, but to show the facts and circumstances surrounding him, and the situation under which he executed the will, such declarations are admissible to aid in the construction of an ambiguous provision.

"Even in a case where direct declarations of intention are not admissible, 'declarations by a testator on a point collateral to the question of intention may be evidence of an independent fact material to the right interpretation of the testator's words' Re Glassington (1906) 2 Ch. (Eng.) 305. See also Re Ofner (1908) W. N. (Eng.) 208—C.A.; Re Ofner (1909) 78 L.J. Ch. N.S. (Eng.) 50—C.A., infra, IV, s. 7.

"Thus, in Re Lummis (1917) 101 Misc. 258, 166 N.Y. S. 936, the court stated: 'The declarations of the testator which have been testified to, showing that the testator appreciated the extravagance of his family, were not offered as declarations of testamentary intention, but for the purpose of showing one of the surrounding circumstances attending the execution of the will. Such declarations of a testator are not received as his expressions of his intention either to charge or not to charge legacies upon the land. They are received in order to show testator's knowledge and appreciation of the extent of his property. This is deemed a proper circumstance to be considered on the question now before the court.'

"And in Gould v. Chamberlain (1903) 184 Mass. 115, 68 N.E. 39, the court stated: 'A testator's declarations of his intentions are inadmissible, though logically they would seem to be the best evidence obtainable. They are excluded, however, by reason of the statute which requires wills to be in writing, and also of the rule that forbids the introduction of parol evidence to alter or vary written instruments. In the present case the evidence that was admitted was not evidence of statements by the testator of his intentions, but was evidence tending to show a knowledge and appreciation on his part of his situation and circumstances, and as such was clearly admissible.'

"And in Sussex Trust Co. v. Polite (1919) 12 Del. Ch. 64, 106 A. 54, the court stated: 'Declarations, whenever made by a testator, as to his intentions in using certain words in the will, or as to a proper construction to be made of them, are inadmissible in evidence. * * * But evidence is always admissible as to the state of the testator's property, and his purpose in acquiring it, as distinct from evidence of his declarations as to the meaning of the words of his will. * * * Such purpose may be shown by declarations or acts, and in this case we have both, and evidence of both is admissible for the same purpose.'

"So, also, in Morse v. Stearns (1881) 131 Mass. 389, admitting declarations of the testator where the inaccurate description was partly applicable to two claimants, the court stated: 'Extrinsic evidence of the conduct and the declarations of the testator is competent. They are not to be deemed direct proof of testamentary intention, but as showing the testator's relation to, and state of feelings towards, any of the respective claimants.'

"And the court in Calder v. Bryant (Mass.) (reported herewith) ante, 19, apparently recognized that declarations of a testator, incidentally throwing light on the terms used in his will, would be admissible as a part of the circumstances surrounding him and as showing his relations with the claimants."

APPENDIX F

Quotations from Oregon Statutes, Cases and A.L.R. Annotations on Admissibility and Effect of Evidence of the Construction of a Will by Interested Parties, cited in Brief, p. 55.

O.C.L.A. Sec. 2-206:

> **"Declaration, act or omission of grantor as evidence.** Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former."

For a construction of the above statute, see *Sperry vs. Wesco,* 26 Or. 483, at p. 491; 38 P. 623, at p. 625.

O.C.L.A. Sec. 2-210:

> **"Declaration, act or omission of decedent against interest.** The declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

O.C.L.A. Sec. 2-228:

> **"Facts which may be proved.** In conformity with the preceding provisions evidence may be given on the trial, of the following facts:
>
> * * * * * * * *
>
> (4) * * * the declaration or act of a deceased person, made or done against his interest in respect to his real property; * * *".

In *Stubbs vs. Abel,* 114 Or. 610, 624; 233 P. 852, 857, the Court said:

"We have referred to the matter of the above petition and the probate proceedings for the purpose of showing the practical construction that was placed upon the will by the parties interested therein. No attempt was made by the heirs to dismember the will by interpreting it to mean what the defendants now assert it means. The devisee, Claire S. Williams, treated his devise as contingent upon his living to the age of thirty years, and such was the construction placed upon the will by the other beneficiaries.

'Although the interpretation placed upon a will by the parties in interest is a circumstance in favor of a similar construction by the court, yet their interpretation is not entitled to control the court.' 30 Am. & Eng. Ency. of Law (2d ed.), 673."

In *Moore vs. Moore*, 121 Or. 48, 56; 252 P. 964, 967, the Court said:

"While the construction given the will by the interested parties is not controlling, it is persuasive on the court where it is just and equitable and has been acquiesced in for many years: 40 Cyc. 1427. In the instant proceeding we think the court is warranted in adopting the construction of the interested parties that the mother and her children were tenants in common of this property."

Annotation: "Practical Construction Placed On Will By Parties Interested", 67 A.L.R. 1272:

p. 1273:

"Where parties interested have acted upon a not unreasonable construction of an ambiguous will, such fact may be considered by the court in deciding as to the true construction."

p. 1277:

"Where a particular construction of an ambiguous will has been adhered to by interested parties for a long period of time, there is a strong tendency of the courts, apart from evidential considerations, to give effect to such construction, at least as against the persons joining therein; and, of course, where the elements of waiver or estoppel clearly appear, there can be no doubt as to the result.

"Thus, in Bacon v. Sayre, (191') 84 Misc. 462, 147 N.Y. Supp. 522 (affirmed in (1914) 164 App. Div. 909, 148 N.Y. Supp. 1105), where a testatrix, after giving equal shares of her estate to her children, absolutely, added the clause, 'in case any of my said children die without leaving issue surviving them, such deceased one's share shall go to his or her surviving brothers and sisters,' it was held, as to the question whether the defeasance by death of a child without issue referred to such death in the lifetime of the testatrix, or later, that the former construction was confirmed by the interested parties' receiving payments of money thereunder, each acquiescing in the payments to the others, and some of them later making their own wills on the assumption of absolute ownership, the court saying: 'The practical interpretation which seems to have been placed upon the mother's will by this family, and particularly by the plaintiff, for nearly thirty years, should not now be disturbed by the court, unless there are most imperative reasons for such action.'

"And likewise in Wrights vs. Oldham (1837) 8 Leigh (Va.) 306, where the question was whether a will provided for the distribution of lands and slaves per stirpes or per capita, it was held that the redistribution per stirpes upon two occasions of parts of such property (following the

death of mere life beneficiaries), without objection by the plaintiff or others, was conclusive of the rights involved.

"And in Follmer's Appeal (1860) 37 Pa. 121, where a legatee, after twenty-five years of acquiescence in the distribution of an estate upon the plan that advances made in the testator's lifetime were to be deducted from the legacies in question, claimed a $10,000 balance to be due him from the executors, it was held that since 'at several successive family meetings payments were made to the several legatees in the presence of each other,' without objection then or afterwards to the plan of distribution adopted, a different construction could not, after such lapse of time, be allowed as a basis for recovery.

"And in Jessup vs. Witherbee Real Estate & Improv. Co. (1909) 63 Misc. 649, 117 N.Y. Supp. 276, where a testator's widow and children, for whom the will created a trust, had, after many years, upon the assumption of absolute title, sold the realty in question and divided the proceeds, it was held that one of such 'children' after acquiescing in such result for thirty-eight years, could not successfully challenge the title so conveyed upon the ground that, at the date of conveyance, the title was in the trustee; the court declaring a rule much broader than the case, that the court will, 'where the language of a will is ambiguous, * * * give effect to the construction placed upon it by all the interested parties."

Annotation: "Admissibility of Extrinsic Evidence to Aid Interpretation of Will", 94 A.L.R. 26:

p. 245:

"A practical construction placed on an ambiguous provision of a will by the interested parties

is admissible in evidence to aid the court in the construction of the will."

In *Re Estate of Daniel Kelly,* 177 Minn. 311; 225 N.W. 156; 67 A.L.R. 1268, at pp. 1271-2, the Supreme Court of Minnesota said:

"Respondents urge practical construction as an additional ground for sustaining the trial court. Practical construction of a will by the parties interested therein has not been extensively treated in reports and texts. It is, however, well recognized and has been applied in several cases.

"In Dorrance v. Dorrance, 151 C.C.A. 460, 238 Fed. 524, Ann. Cas. 1918B, 520, the court held that the fact that certain provisions of a will had been accepted as valid for almost 25 years, while not controlling, called upon the court to be cautious in considering a different contention.

"2 Schouler on Wills, 6th Ed. § 841, states: 'The practical interpretation placed on a will by all parties interested for a long period of time, will not be disturbed, except for most imperative reasons.'

"In Guilford v. Gardner, 180 Iowa 1210, 162 N.W. 261, the court said: 'If the construction of the devise were one open to any reasonable doubt, the fact that the son, the one person adversely affected by the condition attached thereto, survived the testator more than two years, and never in his lifetime, so far as the record shows, questioned the conditional character of his title, it is significant of the meaning and effect of the testator's language, as it appeals to the ordinary mind.'

"In Runyon v. Pond Creek Coal Co., 197 Ky. 757, 248 S.W. 188, the court said: 'In addition, as we have seen, plaintiff himself, by his conduct in moving away in 1896 and making no

claim to any character of interest in the land in controversy for more than fifteen years construed the will as making the top of the ridge the dividing line.'

"Other cases are Coulter v. Crawfordsville Trust Co., 45 Ind. App. 64, 88 N.E. 865; Jessup v. Witherbee Real Estate & Improv. Co., 63 Misc. 649, 117 N.Y. Supp. 276; Bacon v. Sayre, 84 Misc. 462, 147 N.Y. Supp. 522."